89-1174

No. _____

Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

RICHARD G. HIRSCH, AS TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JEANNE GODCHAUX, WIDOW OF ARIEL B. NEWMAN, JR., ET AL.,

Petitioner,

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BALDWIN & HASPEL
JOHN A. ROUCHELL
Suite 2200, Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2200
Telephone: (504) 585-7711
Counsel of Record for Petitioner

LEMLE & KELLEHER
MOISE W. DENNERY
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, LA 70130-6097
Telephone: (504) 586-1241
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the retroactive application of the City of New Orleans Inheritance Tax to heirs and legatees of decedents dying prior to the effective date of enactment is so fundamentally unfair, arbitrary and capricious that due process under the Fifth and Fourteenth Amendments is violated.

2. Whether the enactment of one of the three City of New Orleans Inheritance Tax Ordinances violates due process under the Fourteenth Amendment since it resulted from a misleading and illegal dual proposition ballot.

3. Whether the City's taxing authority is so fundamentally unrelated to inheritances that the City of New Orleans Inheritance Tax violates due process under the Fifth and Fourteenth Amendments.

4. Whether the City of New Orleans Inheritance Tax creates classifications among taxpayers, heirs and legatees so fundamentally unfair, discriminatory, arbitrary and capricious that equal protection under the Fourteenth Amendment is violated.

LIST OF PARTIES

This Petition is for a Writ of Certiorari directed to the Supreme Court of Louisiana in Proceedings No. 88-CA-2761, entitled "Salome Hildebrand v. City of New Orleans, *et al* (and Consolidated Cases)," a consolidation of multiple individual actions by taxpayers, including Petitioner, who sued to invalidate the City of New Orleans Inheritance Tax.

The following are the names of the parties to the consolidated proceedings in the courts below represented by Counsel of Record for Petitioner and their trial civil action numbers:

Civil Action No. 87-9940
Richard G. Hirsch as Testamentary Executor for the Succession of Jeanne Godchaux, Widow of Ariel B. Newman, Jr.

Civil Action No. 87-14353
John Rock, as Testamentary Executor for the Succession of Freda Rock and Anna Rock

Civil Action No. 87-14354
Dorothy Abba, as Testamentary Executrix for the Succession of Jeanne Barre, Widow of Joseph Bunoi

Civil Action No. 88-4845
Lelia T. Morrow as Testamentary Executrix for the Succession of Robert Prosser Morrow, Jr., M.D.

LIST OF PARTIES – Continued

Civil Action No. 88-4846
Rudolph J. Holzer, Jr., as Testamentary Executor for the Succession of Dorothy Bass Holzer

The following parties to the consolidated proceedings in the courts below are represented by Counsel for Petitioner who join in petitioning for a writ of certiorari. If certiorari is granted, the parties below have agreed that, subject to the approval of this Court, Petitioner, Richard G. Hirsch, as Testamentary Executor of the Succession of Jeanne Godchauz, widow of Ariel B. Newman, Jr., shall be treated as petitioner with respect to the briefing and oral argument in this Court:

Civil Action No. 87-8242
Salome Hildebrand

Civil Action No. 87-9235
Bouwe Dykstra

Civil Action No. 87-10106
Ethel B. Leglise
Margaret Joachim LeCorgne
Joan A. Joachim
Victor C. Leglise, Jr.

Civil Action No. 87-13071
Margaret Bourg Booth

Civil Action No. 87-14769
John B. Parker
Katherine P. Kennair

LIST OF PARTIES – Continued

Civil Action No. 87-19642
Isabelle Beatrous

Civil Action No. 87-20436
Dr. Ervil L. Perdue

Civil Action No. 87-21311
Charles Rene Therrelle

Civil Action No. 87-22640
Bessie N. Alcus
Mack O. Teetor, Jr.
Charles Kohlmeyer, Jr.

Civil Action No. 88-12175
Marilyn Pailet Zackin
Susan P. Zackin
Jane Zackin

The following is a complete list of the remaining parties to the proceedings in the courts below which Counsel of Record for Petitioner believes desire a review of the proceedings below, but have not formally joined in petitioning for a writ of certiorari and are not represented by either Counsel of Record or Counsel to Petitioner:

Civil Action No. 88-41360
First National Bank of Commerce
in New Orleans as Executor of the
Succession of Mrs. Ida Lise Black Rodgers

Civil Action No. 87-8492
Lawrence J. Parker, et al.

LIST OF PARTIES – Continued

Civil Action No. 87-9817
Whitney National Bank, Executor
and Trustee under the Will of
Violet Wilson Frederick,
Rose Fenasci and Carol Wilson

Civil Action No. 87-10908
Dennis Leon Rousseau, et al.

Civil Action No. 87-11099
Nancy Lynn Perloff, et al.

Civil Action No. 87-11132
Cleo C. Richmond, et al.

Civil Action No. 87-12289
Alice Beatrice Land

Civil Action No. 87-12290
Succession of Wallace C. Walker

Civil Action No. 88-5901
Manuel J. Castro, Jr.

Civil Action No. 88-6107
Rose Thelma Robards through
George Joseph Finnan, Executor, et al.

Civil Action No. 88-6416
Linda Backes

Civil Action No. 88-7458
Succession of Miss Fellis Maud Leonard
and Wood Brown, III

LIST OF PARTIES – Continued

Civil Action No. 88-9575
Laura Geiser, Widow of Paul Muehlemann
and Paul Muehlemann, Jr.

Civil Action No. 88-15398
Edward J. Belsom, Jr.
Jack E. Belsom
Jill Belsom Faucheaux
Jamey Belsom Faucheaux
Lacey N. Faucheaux
Benjamin L. Belsom
Kristina A. Belsom

Civil Action No. 88-16255
Herbert S. Weil, Executor of the
Succession of Mrs. Virginia Ullman,
wife of Herbert S. Weil

Civil Action No. 87-14521
Mrs. Alethea Clauset Woodworth

Civil Action No. 87-17770
Kendall D. Elliott, II

Civil Action No. 87-21087
Mrs. Jennie Ella Rogers, widow of
Hugh Frederick Hayes, by her
Curatrix, Mrs. Lauresa Pleasant
Stafford Lehotka and Mrs. Lauresa
Pleasant Stafford Lehotka

Civil Action No. 87-23057
Stanley McDermott, Jr.,
Trustee and Norman A. Glaser

LIST OF PARTIES – Continued

Civil Action No. 87-22744
Mrs. Diane Dumestre Thompson,
Claudia Dumestre and
Jeanne Dumestre

Civil Action No. 87-23815
Succession of Mrs. Earline Ann Donier, et al.

Civil Action No. 87-22388
Cleveland M. Duvic, et al.

Civil Action No. 88-3262
Kenneth J. Hartwein, as Testamentary Executor
of the Succession of Gertrude Hartwein

Civil Action No. 88-3974
Succession of Clarence R. Caster, Sr.,
Clarence R. Caster, Jr., Donald J. Caster
and Winnifred Caster McCrary

Civil Action No. 88-5052
Succession of Mrs. Ethel S. Mann,
widow of Richard Irving Alcus,
Mrs. Suzanne Alcus Mann and Leon S. Mann

Civil Action No. 88-17288
Bennett E. Powell, individually
and as Executor of the Succession
of Vernon Edward Powell

Civil Action No. 88-18315
Lucille Mary Russell, widow of
Ormond Marx DeLong

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS viii

TABLE OF AUTHORITIES x

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES 2

STATEMENT OF THE CASE 5

ARGUMENT 9

INTRODUCTION 9

I. THE RETROACTIVE APPLICATION OF THE SECOND AND THIRD ORDINANCES IS A DEPRIVATION OF VESTED PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW 10

II. THE SECOND ORDINANCE VIOLATES DUE PROCESS SINCE IT RESULTED FROM A MISLEADING AND ILLEGAL DUAL PROPOSITION BALLOT 22

III. THE CITY'S TAXING AUTHORITY, ALTHOUGH BROAD, IS SO FUNDAMENTALLY UNRELATED TO INHERITANCES THAT ALL THREE ORDINANCES VIOLATE DUE PROCESS 24

TABLE OF CONTENTS – Continued

Page

IV. ALL THREE ORDINANCES CREATE CLASSIFICATIONS AMONG TAXPAYERS SO FUNDAMENTALLY UNFAIR, DISCRIMINATORY, ARBITRARY AND CAPRICIOUS THAT EQUAL PROTECTION IS VIOLATED 25

CONCLUSION 27

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

JUDICIAL OPINIONS

Austin v. United States, 611 F.2d 117 (5th Cir. 1980) 20

Baten v. Taylor, 386 So.2d 333 (La. 1979).....16, 18

Blodgett v. Holden, 275 U.S. 142 (1927)..... 20

Chicago Bridge & Iron Co. v. Cocreham, 317 So.2d 605 (La. 1975)..... 13

Cahen v. Brewster, 203 U.S. 543 (1906) 14, 15

Collector of Rev. v. Wells Fargo Leasing, 393 So.2d 1244 (La. 1981)..... 13

Coolidge v. Long, 282 U.S. 582 (1931).....9, 21

Cooper v. United States, 280 U.S. 409 (1930)..... 20

Estate of Ekins v. C.I.R., 797 F.2d 481 (7th Cir. 1986) 20

Fein v. United States, 730 F.2d 1211 (8th Cir. 1984) 20

Frick v. Commonwealth, 268 U.S. 473 (1925) 25

Garnett v. Dept. of Revenue & Taxation, 519 So.2d 373 (La. App. 2d Cir. 1988)..... 13

Gaudet v. Economical Super Market, 237 La. 1082, 112 So.2d 720 (1959)..... 23

Hillsborough T.P., Somerset County, N.J., et al v. Cromwell, 326 U.S. 620 (1946) 26

Kohler v. Tugwell, 292 F.Supp. 978 (E.D. La. 1968), *affirmed*, 393 U.S. 531 (1969) 23

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928)..... 26

TABLE OF AUTHORITIES – Continued

Page

Mager v. Grima, 49 U.S. (8 How.) (1850) 24

McCulloch v. Maryland, 17 U.S. 316 (1819) 25, 27

Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) 25

Milliken v. United States, 283 U.S. 15 (1931).....19, 20

Nichols v. Coolidge, 274 U.S. 531 (1927) 21

Simpson v. Colvin, 138 So.2d 438 (La. App. 3d Cir. 1962)..... 16

State v. Fant, 216 La. 58, 43 So.2d 217 (1949) 23

Succession of Bellinger, 229 So.2d 749 (La. App. 1st Cir. 1969) 13

Succession of Levy, 115 La. 377, 39 So. 37 (1905) ..14, 15

Succession of Stauffer, 119 La. 66, 43 So. 928 (1907) .14, 15

Succession of Zaring, 527 So.2d 417 (La. App. 4th Cir. 1988) 13

Tolson v. Police Jury of St. Tammany Parish, 119 La. 215, 43 So. 1011 (1907) 23

Town of Wytheville v. Johnson's Executor, 108 Va. 589, 62 S.E. 328 (1908)..... 6

Tulane University of Louisiana v. Board of Assessors, 115 La. 1025, 40 So. 445 (1905) 16

United States v. Darusmont, 449 U.S. 292 (1981) 20

United States v. Hemme, 476 U.S. 558 (1986)..... 20

TABLE OF AUTHORITIES – Continued

Page

United States v. Perkins, 163 U.S. 625 (1896) 24

Untermyer v. Anderson, 276 U.S. 440 (1928) ... 20, 21, 24

Washington Par. Pol. J. v. Washington Par. Hosp. S.D., 243 La. 671, 146 So.2d 157 (1962) 11

Wattigny v. State, 257 La. 945, 244 So.2d 842 (1971) 26

Welch v. Henry, 305 U.S. 134 (1938) 20

Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940) 25

Wright v. Lake Charles Harbor and Terminal Dist., 186 So.2d 639 (La. App. 3d Cir. 1966) 11

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

CONSTITUTIONAL PROVISIONS

United States

Amend. V ..... *passim*

Amend. XIV ..... *passim*

Louisiana Constitution of 1974

Art. I, § 2 ..... 3, 17, 22, 25

STATUTES

Federal

28 U.S.C. § 1257(3) 2

28 U.S.C. § 1652 ..... 3, 9

28 U.S.C. § 2101(c) 2

28 U.S.C. § 7701(a)(21) 3, 11

TABLE OF AUTHORITIES – Continued

Page

Louisiana

La. Civil Code

art. 9-13 3

art. 902 ..... 3, 24

art. 934 3

art. 940, *et seq.* 3, 16, 18

art. 946 ..... 3, 19

art. 954-963 ..... 4, 19

art. 978 ..... 4, 16

art. 1626 ..... 4, 16

art. 2454 ..... 4, 16

La. Code of Civil Procedure

art. 2951 ..... 4, 18

art. 3001, *et seq.* 4, 17

art. 3211 ..... 4, 18

art. 3421, *et seq.* 4, 17

La. Revised Statutes

R.S. 1:4 ..... 4, 12

R.S. 47:2401, *et seq.* 4, 6

R.S. 47:2407(C) 4, 12, 18

R.S. 47:2408(C) 4, 18

TABLE OF AUTHORITIES – Continued

Page

La. Acts

1904, No. 45 4

1906, No. 109 4

ORDINANCES

Home Rule Charter of the City of New Orleans

§ 3-112(5) 4, 6

§ 3-113 ..... 4, 7

No. _____

In The

Supreme Court of the United States

October Term, 1989

RICHARD G. HIRSCH, AS TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JEANNE GODCHAUX, WIDOW OF ARIEL B. NEWMAN, JR., ET AL.,

Petitioner,

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Louisiana dated September 12, 1989, rehearing denied October 19, 1989, in the Proceedings entitled "Salome Hildebrand v. City of New Orleans, *et al.* (and Consolidated Cases)," No. 88-CA-2761.

OPINIONS BELOW

The Judgment and Opinion of the Supreme Court of Louisiana dated September 12, 1989, and the Judgment

and Opinion of the Supreme Court of Louisiana denying rehearing dated October 19, 1989, are reproduced, respectively, at Appendix 1 and 49 of this Petition.

The Order and Reasons for Ruling of the Civil District Court for the Parish of Orleans, State of Louisiana, dated October 18, 1988, are reproduced at Appendix 76 of this Petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). Timely petitions for rehearing of the Judgment of the Supreme Court of Louisiana were denied on October 19, 1989. This Petition is timely filed pursuant to 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Constitutional Provisions

United States

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . U.S. Const., Amend. V.
>
> . . . No State shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U. S. Const., Amend. XIV.

Louisiana

No person shall be deprived of life, liberty, or property, except by due process of law. Louisiana Constitution of 1974, Art. I, §2.

Statutes

Federal

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. §1652.

The term "levy" includes the power of distraint and seizure by any means. 26 U.S.C. §7701(a)(21).

Louisiana

The following citations to the Louisiana Civil Code, Code of Civil Procedure, Revised Statutes, Acts and the Home Rule Charter of the City of New Orleans are reproduced *in globo* at Appendix 97 through 164 of this Petition.

La. Civil Code *Appendix*

art. 9-13 97-98

art. 902 98

art. 934 98

art. 940, *et seq.* 98-100

art. 946 100

art. 954-963 101-103
art. 978 103-104
art. 1626 104
art. 2454 104

La. Code of Civil Procedure
art. 2951 105-106
art. 3001, *et seq.* 106-109
art. 3211 109
art. 3421, *et seq.* 110-112

La. Revised Statutes
R.S. 1:4 113
R.S. 47:2401, *et seq* 113-146
R.S. 47:2407(C) 124-125
R.S. 47:2408(C) 127

La. Acts
1904, No. 45 147-149
1906, No. 109 150-160

Home Rule Charter of the City of New Orleans
§3-112(5) 161-162
§3-113 162-164

STATEMENT OF THE CASE

This case involves the review of the first effort by a major city to impose an inheritance tax by authority of its Home Rule Charter. The action taken by the City of New Orleans may be replicated by many other cities in the future. The egregious deprivation of the Constitutional rights of the taxpayers in this case strongly warrants review by this Court.

This case presents the questions whether:

(i) The retroactive application of the City of New Orleans Inheritance Tax ("Tax") to heirs and legatees of decedents dying prior to the effective date of enactment is so fundamentally arbitrary and capricious that due process under the Fifth and Fourteenth Amendments to the United States Constitution is violated;

(ii) The enactment of one of the three Tax ordinances violates due process under the Fourteenth Amendment to the United States Constitution since it resulted from a misleading and illegal dual proposition ballot;

(iii) The City of New Orleans' taxing authority is so fundamentally unrelated to inheritances that the Tax violates due process under the Fifth and Fourteenth Amendments to the United States Constitution; and

(iv) The Tax ordinances create classifications among taxpayer heirs and legatees so fundamentally unfair, arbitrary and capricious that equal protection under the Fourteenth Amendment to the United States Constitution is violated.

The facts of the case are not in dispute, although the legal conclusions drawn by the Supreme Court of Louisiana from those facts have serious ramifications for Constitutionally protected, vested property rights of taxpayers and are of the essence of this Petition.

The City of New Orleans ("City") is a municipal corporation operating under a Home Rule Charter granted by the Louisiana Constitution. The City's legislative body, the Council of the City of New Orleans ("City Council"), enacted Ordinance Calendar Number 13,368 ("First Ordinance") purporting to impose a municipal inheritance tax on heirs and legatees of certain estates of decedents dying on or after the effective date of enactment, July 15, 1986. *See* Appendix 53 through 58. The First Ordinance was the first effort by a major city to impose an inheritance tax on its citizens through its Home Rule Charter, although the town of Wytheville, Virginia made an unsuccessful attempt at the turn of the Century. *Town of Wytheville v. Johnson's Executor*, 108 Va. 589, 62 S.E. 328 (1908). The First Ordinance parallels the general scheme of the Louisiana State Inheritance Tax Law. LSA-R.S. 47:2401, *et seq.* *See* Appendix 115 through 146.

The procedures followed by the City Council clearly violated no less than three of the requirements of Section 3-112(5) of the Home Rule Charter for the levy of taxes, designed to protect the taxpaying public's right to advance notice and to guarantee due process. *See* Appendix 161-162.

In evidence of the utter nullity of its prior actions, on August 7, 1986, the City Council enacted Ordinance Calendar Number 13,439 ("Second Ordinance"), purporting to amend and reordain the First Ordinance. *See* Appendix 59 through 66. The enactment of the Second Ordinance was effective August 12, 1986, pursuant to Section 3-113 of the Home Rule Charter, but the Second Ordinance, by its terms, purports to apply *retroactively* to July 15, 1986, the enactment date of the First Ordinance. *See* Appendix 65 and 162-164.

Petitioner is the Testamentary Executor of the Succession of Jeanne Godchaux Newman who died while domiciled in Orleans Parish on July 29, 1986, fourteen (14) days *after* the enactment of the First Ordinance and fifteen (15) days *before* the enactment of the Second Ordinance.

After numerous taxpayer suits were filed attacking the First and Second Ordinances on various grounds, including violations of the U.S. and Louisiana Constitutions, on December 10, 1987, nearly a year and a half after the First Ordinance, the City Council enacted Ordinance Calendar Number 14,420 ("Third Ordinance") purporting to amend and reordain the Second Ordinance in an apparent effort to cure the violations alleged in the taxpayer suits. *See* Appendix 67 through 73. The enactment of the Third Ordinance was effective December 22, 1987, pursuant to the Home Rule Charter, but the Third Ordinance, by its terms, purports to apply *retroactively* to July 15, 1986, the enactment date of the First Ordinance. *See* Appendix 67-68.

Substantially all of the taxpayer suits, including Petitioner's and an intervention by the State of Louisiana, which were pending against the City in the Spring of 1987 were consolidated, the City filed an answer, facts were stipulated and cross motions for summary judgment were filed and argued by the taxpayers and the City.

On October 18, 1988, the Honorable Revius O. Ortique, Jr. of the Civil District Court for the Parish of Orleans, State of Louisiana, rendered a summary judgment in favor of the taxpayers and against the City, ruling the Tax unconstitutional under the Louisiana Constitution of 1974, without the necessity of addressing taxpayer's federal constitutional arguments. *See* Appendix 76 through 96. The City appealed directly to the Supreme Court of Louisiana pursuant to applicable provisions of the Louisiana Constitution. On appeal, the taxpayers reasserted all of the arguments raised at trial, including the issues raised in this Petition.

On September 12, 1989, the Supreme Court of Louisiana, in a five to two decision, affirmed in part the judgment of the Civil District Court insofar as it declared unconstitutional the tax on tangible movable property which had acquired a situs outside the City, but, in all other respects, reversed the Civil District Court and upheld the Tax generally. The Court held that the First Ordinance was utterly null, void, invalid, of no effect and incapable of amendment, yet held that the Second and Third Ordinances were effective retroactive to July 15, 1986. *See* Appendix 1 through 42.

Timely applications for rehearing were filed by the taxpayers, all of which were denied on October 19, 1989.

See Appendix 49 through 51. The denial of the applications for rehearing filed by Petitioner and one other taxpayer, each involving decedents dying between the First and Second Ordinances, was made over the dissents of three of the seven justices of the Supreme Court of Louisiana, with Justice Calogero filing a dissenting opinion. *See* Appendix 52.

A political firestorm resulted from the Supreme Court of Louisiana's decision. Mayor Barthelemy, facing re-election in early February, 1990, completely reversed his support for the Tax after his political opponent publicly denounced it and, thereafter, took the lead in the election polls. At the behest of the Mayor, on September 1, 1989, the City Council adopted Ordinance Calendar Number 15,913 which repealed the tax *prospectively* for estates of decedent's dying after December 31, 1989. *See* Appendix 74-75. The taxpayers, including Petitioner, remain presumptively liable for the Tax.

ARGUMENT

INTRODUCTION

Although the proceedings below involve questions of interpretation of state and local law, it is well settled that when the jurisdiction of the Supreme Court of the United States is invoked to determine whether the operation of a state or local tax law violates federal law, including due process, this Court must examine those laws to determine their effect in order to properly enforce the provisions of the United States Constitution. *Coolidge v. Long*, 282 U.S. 582 (1931); 28 U.S.C. § 1652.

I. THE RETROACTIVE APPLICATION OF THE SECOND AND THIRD ORDINANCES IS A DEPRIVATION OF VESTED PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW

The Supreme Court of Louisiana properly ruled that, as a result of numerous violations of the City's Home Rule Charter, the First Ordinance was " . . . *invalid and of no effect* . . . " and "*incapable of amendment.*" Appendix 36 and 38 (emphasis added). Assuming, *arguendo,* that the Second and Third Ordinances are valid, the retroactive application of the Second Ordinance and the subsequent retroactive application of the Third Ordinance each to the effective date of enactment of the First Ordinance (itself of *no effect* and *incapable of amendment*) is so fundamentally unfair, arbitrary and capricious that due process guaranteed by the Fifth and Fourteenth Amendments is clearly violated.

A. The Tax is Imposed and Due at the Moment of Death.

The Supreme Court of Louisiana's interpretation of the clear language of the Ordinances constitutes judicial legislation which is contrary to the unambiguous legislative intent of the City Council and is a rationalization away of the obvious retroactivity of the Ordinances.

Section 28A-1 of the Second and Third Ordinances each specifically provide that "[T]he levy of the tax shall take effect *at the moment of death.*" *See* Appendix 60 and 68 (emphasis added). Although the Tax is not *payable* until the Louisiana inheritance tax return is filed with the Collector of Revenue of the State of Louisiana (Appendix

64 and 72), the fact of liability is established by the event and timing of death and not the time of receipt of the property by the heirs or legatees or the time for filing of a Louisiana State inheritance tax return. Thus, the Tax is purportedly effective and due at death, but payable at a later date. The imposition of liability for a tax followed by a subsequent date of payment is an assessment and collection procedure common to virtually every federal, state and local tax. Under Louisiana law, a "levy" of a tax takes place the moment a governmental authority imposes liability for the tax, even though payable and collectible at a later date. *Washington Par. Pol. J. v. Washington Par. Hosp. S.D.*, 243 La. 671, 146 So.2d 157 (1962); *Wright v. Lake Charles Harbor and Terminal Dist.*, 186 So.2d 639 (La. App. 3d Cir. 1966). A tax is levied *after* legal responsibility for payment is established, *not before*, and the power to "levy" a tax includes a governmental power of seizure and distraint. *See*, for example, Internal Revenue Code § 7701(a)(21).

Nevertheless, in a strained effort to rescue a mortally wounded statute, the Supreme Court of Louisiana ignored the clear and unambiguous legislative intent of the City Council expressed in Section 28A-1 of the Second and Third Ordinances, confused the date a tax liability is imposed with the date for payment and accepted the City's argument that Section 28A-1 is ambiguous and may be reasonably interpreted to refer to the valuation date for calculation of the tax.

The Supreme Court of Louisiana's interpretation of Section 28A-1 is grossly misplaced and is nothing more than a strained statutory interpretation designed to avoid

the obvious retroactivity of the Ordinances. Both the Louisiana State Inheritance Tax law in LSA-R.S. 47:2401 and the City Inheritance Tax in Section 28A-1, each in Sections entitled "Levy of Tax," provide that "[T]here is hereby *levied* a tax upon all inheritances, legacies and donations and gifts made in contemplation of death . . . " (*See* Appendix 59, 67 and 115; emphasis added). However, unlike the state statute, Section 28A-1 of the City Ordinances uses the term *"levy"* a second time when it states "[T]he *levy* of the tax shall take effect at the moment of death." (Emphasis added.) The term "levy" must be given its customary meaning, that is, "imposition," especially when it is used *twice* in the same Section. Louisiana Civil Code art. 9; LSA-R.S. 1:4. *See* Appendix 97 and 113.

A review of the Ordinances makes it abundantly clear that other sections deal specifically with valuation dates:

> " . . . the tax shall be two percent of the fair market value thereof *at the time of death . . .* " (Section 28A-3A; Direct descendants, ascendants or surviving spouse; Appendix 61, 69);
>
> " . . . the tax shall be five percent of the fair market value thereof *at the time of death . . .* " (Section 28A-3B; Collateral relations, brothers and sisters; Appendix 61, 69);
>
> " . . . the tax shall be five percent of the fair market value thereof *at the time of death . . .* " (Section 28A-3C; Strangers; Appendix 62, 70);
>
> " . . . the tax imposed by this Chapter shall be imposed with respect to all property of every nature and kind . . . *at the time of death . . .* " (Section 28A-4; Appendix 62-63, 70-71).

(Emphasis Supplied).

In no less than four other places in the Ordinances the City Council made it obvious that the calculation of the tax is based upon valuation at the date of the decedent's death. It is interesting to note that the language concerning the levy of the tax at death is absent from the First Ordinance. Surely, the City Council intended Section 28A-1 to have some meaning independent of the valuation date for calculation of the tax since the Ordinances specifically provide for valuation in no less than four other sections.

Although Section 28A-1 of the Second and Third Ordinances is as clear as a statute could be, even if it were ambiguous, the Supreme Court of Louisiana's interpretation violated a longstanding principle of Louisiana law that if state and local tax statutes are susceptible of more than one reasonable interpretation, the construction most favorable to the taxpayer must be adopted. *Collector of Rev. v. Wells Fargo Leasing*, 393 So.2d 1244 (La. 1981); *Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 605 (La. 1975); *Succession of Zaring*, 527 So.2d 417 (La. App. 4th Cir. 1988); *Garnett v. Dept. of Revenue & Taxation*, 519 So.2d 373 (La. App. 2d Cir. 1988); *Succession of Bellinger*, 229 So.2d 749 (La. App. 1st Cir. 1969).

There can be no doubt that the moment of death triggers the application of the Tax. The Supreme Court of Louisiana should not be permitted to exercise a legislative function by redrafting Section 28A-1 of the Second and Third Ordinances to read "[T]he levy of the tax shall take effect as to all open successions," in a veiled effort to avoid the obvious retroactivity of the Ordinances.

B. The Tax Is Imposed Retroactively.

In a second example of judicial legislation, the Supreme Court of Louisiana in effect rewrote Section 28A-1 to levy the tax on all successions open as of July 15, 1986, rather than follow the language of the Ordinances which makes it abundantly clear that the moment of death is the statutory benchmark.

The Supreme Court of Louisiana's reliance on *Succession of Levy*, 115 La. 377, 39 So. 37 (1905), *aff'd sub nom, Cahen v. Brewster*, 203 U.S. 543 (1906) and *Succession of Stauffer*, 119 La. 66, 43 So. 928 (1907) is misplaced. *Levy* dealt with a taxpayer attack on the validity of the first Louisiana State Inheritance Tax Statute enacted pursuant to the Constitution of 1898, by virtue of Act No. 45 of 1904 which, by its own terms, was applicable "on all successions not finally closed and administered upon." *See* Appendix 40 and 148. *Stauffer* reviewed a similar issue dealing with Act No. 109 of 1906 which superseded the *Levy* statue, but nevertheless applied to "all successions not finally closed, or in which the final account has not been filed." *See, Succession of Stauffer*, 119 La. 66, at p. 67 and Appendix 41 and 160. In both instances, these early state inheritance tax statutes were applicable specifically to open successions at their effective dates and, thus, in order to rescue the statutes, the courts in *Levy* and *Stauffer* held that the taxable event based upon the effective date language must have only occurred when seizin in law merged with seizin in fact, thereby resulting in no retroactive application. In the case at bar, the express provisions of Section 28A-1 make it clear that liability for the Tax takes place at the moment of death,

while the statutes in *Levy* and *Stauffer* were effective only upon transmission of possession.

While it is undoubtedly true that the language cited by the Supreme Court of Louisiana from *Cahen v. Brewster*, 203 U.S. 543, at 550-51 (1906) (Appendix 40-41) supports the proposition that a taxing authority has the power to select the moment of death or some other point in time to make effective an inheritance tax, *Cahen* does not permit the taxing authority to impose a tax *retroactively*, nor does it permit the Supreme Court of Louisiana to *ignore Section 28A-1* enacted by the City Council. In fact, the excerpt from *Cahen* cited by the Supreme Court of Louisiana prohibits the result reached by that Court's opinion:

> " . . . In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates and usurp the power *we did not and do not possess . . .* " (*See* Appendix 40-41; emphasis added).

Cahen v. Brewster, 203 U.S. at 550-51.

The severance clause contained in Section 2 of the Second and Third Ordinances permits *removal* of a legally offensive provision of the ordinance, but does not authorize a court to *insert* a provision into the ordinance to preserve its legality. (*See* Appendix 64-65 and 72-73).

C. The Tax is a Deprivation of Vested Rights.

In its opinion, the Supreme Court of Louisiana ruled that due process was not violated by the Second Ordinance because property rights were not vested prior to

enactment. *See* Appendix 42. The Supreme Court of Louisiana has confused the civil law doctrine of *seizin* with the deprivation of vested rights of *ownership*, concentrating on the former and ignoring the latter.

Under Louisiana law, a succession is opened by operation of law at the moment of death. Louisiana Civil Code art. 934. Appendix 98. The Supreme Court of Louisiana held unequivocally that *ownership* of property (as opposed to seizin) *immediately vests* in the decedent's heirs or legatees at the moment of death.

> ". . . .Ownership, on the other hand, is transmitted by operation of law at the moment of death to heirs and legatees designated by the Code, regardless of whether they have seizin of a particular succession or whether they can ever have seizin."

Baten v. Taylor, 386 So.2d 333, 340 (La. 1979). *See also*, Louisiana Civil Code arts. 940, *et seq.* and 1626. Appendix 98-104.

The rights acquired by an heir or legatee immediately upon death are rights of ownership or legal, proprietary or civil rights of possession with all the advantages which flow from those rights, including accretion, prescription and the rights to civil and natural fruits. *Simpson v. Colvin*, 138 So.2d 438 (La. App. 3d Cir. 1962); *Tulane University of Louisiana v. Board of Assessors*, 115 La. 1025, 40 So. 445 (1905). For example, an heir may accept or renounce a succession or alienate succession rights only after the decedent's death, not before. Louisiana Civil Code art. 978 and 2454. Appendix 103 and 104. These vested rights are protected from deprivation without due process by the Fifth Amendment to the United States Constitution

and Article I, Section 2 of the Louisiana Constitution of 1974.

The immediate vesting of *ownership* (as opposed to seizin) has a number of practical applications which cannot be ignored:

1. The heirs or legatees of a decedent may be placed into possession immediately upon the death of the decedent without an administration of the succession. Louisiana Code of Civil Procedure arts. 3001, *et seq.* Appendix 106-109. No seizin vests in a succession representative. Ownership vests in the heirs or legatees at the moment of death.

2. The succession may qualify as a "small succession" under Louisiana Code of Civil Procedure arts. 3421, *et seq.* requiring no judicial proceeding at all. Ownership vests in the heirs at the moment of death. Appendix 110-112.

3. The heirs of the decedent, for whatever reason, may never open a judicial succession proceeding. Ownership vests in the heirs at the moment of death.

4. The decedent may have placed assets in a revocable "living" trust, a common planning tool. At the decedent's death, the trust immediately terminates and the assets are delivered to the designated principal beneficiaries. These assets do not form part of the probate estate (although Louisiana State Inheritance Tax is due). Ownership vests in the beneficiaries at the moment of death.

5. Certain assets, such as U. S. Savings Bonds designated in joint name ("A" or "B"), vest in the survivor at the moment of death.

The foregoing examples illustrate that ownership can be vested in heirs with no seizin in a succession representative.

Under Louisiana law, the doctrine of seizin also *immediately vests* the heirs or legatees of a decedent with property rights *at the moment of death*, independent of any action on their part. Louisiana Civil Code art. 940, *et seq.* Appendix 98-100. Although there are four (4) recognized exceptions to the doctrine of seizin, the only exception involving governmental interference in the uninterrupted passage of seizin from the decedent to the heirs or legatees is the legal prohibition on rendition of judgments of possession, delivery of legacies and discharge of succession representatives unless satisfactory proof is given that all Louisiana *State Inheritance Taxes* have been paid. Louisiana Code of Civil Procedure art. 2951 (Appendix 105-106); LSA-R.S. 47:2407(C) and 2408(C) (Appendix 124 and 127). The interruption of seizin in favor of the State of Louisiana results from specific authority set forth in the Code of Civil Procedure and Revised Statutes for which there is no statutory counterpart supporting the City Inheritance Tax. All of the other three (3) exceptions to the doctrine of seizin are likewise supported by specific statutory authority:

1. The succession representative has seizin of the decedent's property although *ownership* is immediately vested in the heirs and legatees. Louisiana Code of Civil Procedure art. 3211 (Appendix 109); *Baten v. Taylor*, 386 So.2d 333 (La. 1979). *See*, however, the five (5) examples cited above where a succession representative has no seizin.

2. A child conceived at the time of the decedent's death is considered in-being and vested with the right of inheritance if the child is born alive. Louisiana Civil Code arts. 954-963. (Appendix 101-103).

3. An heir or legatee has the right to accept or renounce a succession, effective retroactive to the date of death. Louisiana Civil Code art. 946. (Appendix 100).

There is no statutory support in any of the three City Inheritance Tax Ordinances for interrupting seizin in favor of the City by analogy to state law or otherwise. The Supreme Court of Louisiana's opinion writes into the Ordinances exceptions to the rule of immediate vesting of seizin by *analogy* to state law and is a third example of judicial legislation by that Court in order to uphold the Tax by its own bootstraps.

There can be no doubt that the Tax is imposed at the moment of death and that the imposition of the Tax to successions of decedents dying between July 15, 1986 and August 12, 1986 is a retroactive application of an entirely new tax in direct violation of the taxpayer's vested property rights of ownership and seizin and, as such, violates the taxpayer's fundamental rights of due process.

D. The Retroactive Application of an Entirely New Tax Violates Due Process.

A revenue law does not necessarily violate due process simply because the law is applied retroactively. In such circumstances, this Court must consider the nature of the tax and the circumstances of its enactment to determine whether its retroactive application is so harsh, arbitrary and capricious that due process is violated. *Milliken v. United States*, 283 U.S. 15 (1931); *Welch v. Henry*,

305 U.S. 134 (1938); *United States v. Hemme*, 476 U.S. 558 (1986).

Once a tax has been enacted and is established, the legislative body creating the tax *thereafter* may modify the rate, create new grounds to impose the tax, change deductions, credits and exemptions or otherwise alter the operation of the tax retroactively without violating due process. *Cooper v. United States*, 280 U.S. 409 (1930); *United States v. Darusmont*, 449 U.S. 292 (1981). *See also Milliken v. United States, Welch v. Henry and United States v. Hemme, supra; Austin v. United States*, 611 F.2d 117 (5th Cir. 1980); *Estate of Ekins v. C.I.R.*, 797 F.2d 481 (7th Cir. 1986); and *Fein v. United States*, 730 F.2d 1211 (8th Cir. 1984).

However, when a legislature enacts an *entirely new tax*, a retroactive application clearly violates due process, even if the transaction sought to be taxed occurs while the legislature is deliberating.

> " . . . The mere fact that a gift was made while the bill containing the questioned provisions was in the last stage of progress through Congress we think is not enough to relieve the legislature of the arbitrary character ascribed to it . . . *The taxpayer may justly demand to know when and how he becomes liable for taxes – he cannot foresee and ought not to be required to guess the outcome of pending measures.* The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

Untermyer v. Anderson, 276 U.S. 440 (1928), at 276 U.S. 445 and 446 (emphasis added). *See also, Blodgett v. Holden*, 275

U.S. 142 (1927); *Nichols v. Coolidge*, 274 U.S. 531 (1927); *Coolidge v. Long*, 282 U.S. 582 (1931).

If ever there was a tax which is new and unforeseeable within the rationale of *Untermyer*, the New Orleans City Inheritance Tax must surely qualify. Despite exhaustive research, Petitioner has uncovered no other instance in the history of this country where a municipality has attempted to impose an inheritance tax by authority of its Home Rule Charter. Until July of 1986, such a tax was beyond the wildest dream of the City Council or the Mayor. After September 12, 1989, such a tax became the worst nightmare of the citizens of New Orleans. Now even the City Council and the Mayor have repudiated the Tax, although refusing to refund payments made under protest by its citizens.

The selection by the City Council of the moment of death as the triggering event for application of the tax, the holding of the Supreme Court of Louisiana that the Ordinance was utterly null and void, of no effect and incapable of amendment and the retroactive imposition of the tax to successions of decedents dying between July 15, 1986 and August 12, 1986 has resulted in an egregious violation of due process guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

For the foregoing reasons, this petition for writ of certiorari should be granted in favor of all affected taxpayers, such as Petitioner, involved in successions of decedents dying between the First and Second Ordinances.

II. THE SECOND ORDINANCE VIOLATES DUE PROCESS SINCE IT RESULTED FROM A MISLEADING AND ILLEGAL DUAL PROPOSITION BALLOT

Section 4 of the Second Ordinance provided that the Tax would terminate if a real property service charge was approved by voters at an election to be held on September 27, 1986, and also provided for the termination of the tax on December 31, 1986, without regard to the real property service charge election. Appendix 65.

The Supreme Court of Louisiana, in a fourth exercise of judicial legislation, rewrote the termination provision of Section 4 to uphold the Second Ordinance (Appendix 34) but failed to address the violation of due process guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 2 of the Louisiana Constitution of 1974 resulting from a misleading and illegal dual proposition ballot.

On September 27, 1986, the voters were required to accept or reject the Tax at the same time they were voting on the real property service charge. The only alternatives available to the voters were to vote for the enactment of the real property service charge and for the repeal of the Tax, or to vote against the enactment of the real property service charge and for continuation of the Tax. The voters were subjected to an illegal dual proposition because they were not given the option of voting on the taxes separately. The voters rejected the real property service charge.

The Constitution of the United States and the Louisiana Constitution require that a ballot contain sufficient

information to identify the proposition which the voter is voting for or against. That is, the City may not mislead its voters to the extent that they do not know what they are voting for or against. *Kohler v. Tugwell*, 292 F.Supp. 978 (E.D. La. 1968), *affirmed*, 393 U.S. 531 (1969). As a result of the termination provision in the Second Ordinance, the Council deprived its citizenry of their constitutional rights by misleading the voters.

Even if the citizens had knowledge of the complexity of their vote, they were denied their constitutional right to a meaningful choice. By effectively placing both taxes before the voters in one proposition, a dual proposition, the voters were denied their free exercise of judgment. *State v. Fant*, 216 La. 58, 43 So.2d 217 (1949). Dual propositions are against the very spirit of popular elections.

> "If the voter cannot vote against the [the proposition] without at the same time voting against [another proposition], or vice versa, he is not allowed a free exercise of his judgment. That mode of taking a vote is known in ordinary legislation as 'log-rolling' and is utterly condemned."

Tolson v. Police Jury of St. Tammany Parish, 119 La. 215, 43 So. 1011 (1907).

Although Section 2 of the Second Ordinance contains a savings clause (Appendix 64-65), Section 4 is not severable since the City Council's intent to terminate the Tax on December 31, 1986, and to obtain voter participation regarding the continued operation of the tax is an integral part of the overall ordinance. *Gaudet v. Economical Super Market*, 237 La. 1082, 112 So.2d 720 (1959).

Accordingly, the enactment of the Second Ordinance violated due process guaranteed by the Fourteenth Amendment to the U.S. Constitution, thereby rendering the Ordinance null and void. Furthermore, assuming, *arguendo*, that the Third Ordinance is valid, the retroactive application of the Third Ordinance to the date of enactment of the First Ordinance violates due process under the rationale of *Untermyer v. Anderson, supra.*

III. THE CITY'S TAXING AUTHORITY, ALTHOUGH BROAD, IS SO FUNDAMENTALLY UNRELATED TO INHERITANCES THAT ALL THREE ORDINANCES VIOLATE DUE PROCESS

The imposition of an inheritance tax is an exercise of sovereignty belonging solely to the State of Louisiana which, unlike the City, inherits the intestate succession of its citizens having no spouse, blood or adopted relations. Louisiana Civil Code art. 902. (Appendix 98); *Mager v. Grima*, 49 U.S. (8 How.) (1850); *United States v. Perkins*, 163 U.S. 625 (1896).

The heirs and legatees of a decedent domiciled in the City at the time of death must pay a tax in addition to and often in the same amount as the Louisiana State Inheritance Tax for the privilege of inheriting property, a right which is guaranteed by state and not local law. Curiously, if the State of Louisiana would inherit a succession pursuant to Louisiana Civil Code art. 902, the sovereign State of Louisiana would owe the City the Tax since the Ordinances provide the State with no exemption.

The City confers no benefit or protection on those paying the Tax. Taxpayers not domiciled in the City are

forced to pay a Tax even though they may never use the property within the City or even set foot there.

Due process requires some definite link, some minimum connection between the taxing authority and the person, property or transaction it seeks to tax. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954); *Frick v. Commonwealth*, 268 U.S. 473 (1925); *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435 (1940). There is no such link or nexus of inheritances to the City.

As far back as 1819, Chief Justice Marshall said:

> All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

McCulloch v. Maryland, 17 U.S. 316, 429 (1819).

The City's almost unlimited right to tax under its Home Rule Charter and under the provisions of the Louisiana Constitution of 1974 is clearly limited by the Due Process clauses of both the Louisiana Constitution and the United States Constitution. *See* U.S. Const. Amend. XIV; La. Const. of 1974, art. I, §2. Consequently, all three Tax Ordinances are utterly null and void.

IV. ALL THREE ORDINANCES CREATE CLASSIFICATIONS AMONG TAXPAYERS SO FUNDAMENTALLY UNFAIR, DISCRIMINATORY, ARBITRARY AND CAPRICIOUS THAT EQUAL PROTECTION IS VIOLATED

The Fourteenth Amendment provides protection from state action which discriminates by imposing taxes

on a taxpayer not imposed on others of the same class. *Hillsborough TP., Somerset County, N.J., et al. v. Cromwell,* 326 U.S. 620 (1946). The Supreme Court of Louisiana erroneously analyzed the Ordinances by comparing classifications of decedents without analyzing classifications of heirs and legatees which are the true taxpayers under the Ordinances.

The Ordinances would require that an heir or legatee of a New Orleans domiciliary pay what amounts to a double tax (when the City Tax and Louisiana Inheritance Taxes are aggregated) in order to receive the same right to inherit that a beneficiary of a decedent domiciled in another Parish enjoys at half the tax cost. Unequal treatment of beneficiaries of Louisiana domiciliaries cannot be sustained solely on the basis of the domiciles of the decedents. *Wattigny v. State,* 257 La. 945, 244 So.2d 842 (1971), citing *Louisville Gas & Electric Co. v. Coleman,* 277 U.S. 32 (1928).

Furthermore, a beneficiary of a New Orleans domiciliary receiving New Orleans real estate will pay the Tax, while a beneficiary of the same decedent receiving a bequest of real estate located outside New Orleans will pay no Tax.

Additionally, the Ordinances exempt from the Tax only those charities which happen to be located within the City at the time of the decedent's death. *See* Appendix 54, 60 and 68. The Supreme Court of Louisiana found that one purpose of the Tax was to improve the quality of life for the City's citizens. *See* Appendix 24. The physical location of a charity bears little or no relation to the benefit it may confer on the City or its citizens. Rather, it

is the place where such charities spend their funds and perform services which should control the exemption from the Tax. Innumerable charitable, educational and religious institutions located outside the City confer benefits on the City's citizens to the same or even to a greater extent than similarly situated organizations located within the City. Yet these same organizations are subject to the Tax solely because of an office location outside the City.

All of the foregoing classifications are arbitrary, capricious and bear no rational relation to a legitimate governmental interest. As a result, all three of the Ordinances violate the Equal Protection Clause of the Fourteenth Amendment and are null and void.

CONCLUSION

> . . . Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

Due process and equal protection of law, the cornerstones of our representative form of democracy, require some rational nexus between a taxing authority and the transaction to be taxed, advance notice, a fair hearing and equal treatment of similarly situated taxpayers before vested property rights may be deprived by government, regardless of the necessity, expediency or

noble purpose for the revenue derived. It is the duty of this Court to protect these fundamental rights.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BALDWIN & HASPEL
JOHN A. ROUCHELL
Suite 2200, Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2200
Telephone: (504) 585-7711

Counsel of Record for Petitioner

LEMLE & KELLEHER
MOISE W. DENNERY
21st Floor, Pan American
Life Center
601 Poydras Street
New Orleans, LA 70130-6097
Telephone: (504) 586-1241

Counsel for Petitioner

APPENDIX

APPENDIX INDEX

App.

Judgment and Opinion, Supreme Court of Louisiana, dated September 12, 1989 1

Judgment and Opinion denying rehearing, Supreme Court of Louisiana, dated October 19, 1989 49

Ordinance Calendar No. 13,368 ("First Ordinance") 53

Ordinance Calendar No. 13,439 ("Second Ordinance") 59

Ordinance Calendar No. 14,420 ("Third Ordinance") 67

Ordinance Calendar No. 15,913 74

Order and Reasons for Ruling, Civil District Court for the Parish of Orleans, State of Louisiana, dated October 18, 1988 76

Citations to the Louisiana Civil Code 97-104

Citations to the Louisiana Code of Civil Procedure 105-112

Citations to the Louisiana Revised Statutes..... 113-146

Citations to Louisiana Acts 147-160

Citations to the Home Rule Charter of the City of New Orleans 161-164

App. 1

SUPREME COURT OF LOUISIANA

NO. 88-CA-2761

(Filed SEP 12 1989)

SALOME HILDEBRAND

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL,
DIRECTOR OF FINANCE, CITY OF NEW ORLEANS

consolidated with

LAWRENCE J. PARKER, ET AL

versus

CITY OF NEW ORLEANS

consolidated with

BOUWE DYKSTRA

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL,
DIRECTOR OF FINANCE, CITY OF NEW ORLEANS

consolidated with

WHITNEY NATIONAL BANK,
EXECUTOR AND TRUSTEE
UNDER THE WILL OF VIOLET WILSON FREDERICK
AND ROSE FENASCI AND CAROL WILSON

versus

CITY OF NEW ORLEANS AND PAUL C. MITCHELL, JR.
DIRECTOR OF FINANCE OF THE
CITY OF NEW ORLEANS

consolidated with

RICHARD G. HIRSCH, AS TESTAMENTARY
EXECUTOR OF THE SUCCESSION
OF JEANNE GODCHAUX, WIDOW OF
ARIEL B. NEWMAN, JR.

versus

CITY OF NEW ORLEANS, THE COUNCIL
OF THE CITY OF NEW ORLEANS,
THE HONORABLE SIDNEY J. BARTHELEMY,
IN HIS CAPACITY AS MAYOR OF
THE CITY OF NEW ORLEANS, AND
THE HONORABLE PAUL MITCHELL, IN HIS
CAPACITY AS DIRECTOR OF FINANCE
OF THE CITY OF NEW ORLEANS

consolidated with

MRS. ETHEL B. LEGLISE, ET AL

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL,
DIRECTOR OF FINANCE, CITY OF NEW ORLEANS

consolidated with

DENNIS LEON ROUSSEAU, ET AL

versus

CITY OF NEW ORLEANS

consolidated with

NANCY LYNN PERLOFF, ET AL

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

CLEO C. RICHMOND AND ANNIE RICHMOND

versus

CITY OF NEW ORLEANS AND PAUL C. MITCHELL,
JR.,
DIRECTOR OF THE DEPARTMENT OF FINANCE
OF THE CITY OF NEW ORLEANS

consolidated with

ALICE BEATRICE D. LAND

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS

consolidated with

SUCCESSION OF WALLACE C. WALKER

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS

consolidated with

MARGARET BOURG BOOTH

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

JOHN ROCK, AS TESTAMENTARY EXECUTOR FOR THE SUCCESSION OF FREDA ROCK AND ANNA ROCK

versus

THE CITY OF NEW ORLEANS, THE COUNSEL OF THE CITY OF NEW ORLEANS, ET AL

consolidated with

MRS. DOROTHY H. ABBA, AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JEANNE BARRERE, WIDOW OF JOSEPH BUNOL

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

MANUEL J. CASTRO, JR.

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

ROSA THELMA ROBARDS THROUGH
GEORGE JOSEPH FINNAN,
EXECUTOR, ET AL

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

LINDA BACKES

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

SUCCESSION OF MISS FELLIS MAUD LEONARD
AND WOOD BROWN, III

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

LAURA GEISER, WIDOW OF PAUL MUEHLEMANN
AND PAUL MUEHLEMANN, JR.

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

MARILYN PAILET ZACKIN, SUSAN P. ZACKIN
AND JANE ZACKIN

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

EDWARD J. BELSOM, JR., JACK E. BELSOM,
JILL BELSOM FAUCHEAUX, JAMEY BELSOM
FAUCHEAUX, LACEY N. FAUCHEAUX,
BENJAMIN L. BELSOM AND
KRISTINA A. BELSOM

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

HERBERT S. WEIL, EXECUTOR OF THE SUCCESSION OF MRS. VIRGINIA ULLMAN WIFE OF HERBERT S. WEIL

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

MRS. ALETHEA CLAUSET WOODWORTH

versus

CITY OF NEW ORLEANS

consolidated with

JOHN B. PARKER AND KATHERINE P. KENNAIR

versus

THE CITY OF NEW ORLEANS, ET AL

consolidated with

KENDALL D. ELLIOTT, II

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

DR. ERVIL L. PERDUE

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

MRS. JENNIE ELLA ROGERS, WIDOW OF HUGH FREDERICK HAYES, REPRESENTED BY HER CURATRIX, MRS. LAURESA PLEASANT

STAFFORD LEHOTKA AND MRS. LAURESA PLEASANT STAFFORD LEHOTKA

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

CHARLES RENE THERRELLE

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

STANLEY MCDERMOTT, JR., TRUSTEE AND NORMAN A. GLASER

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

MRS. DIANE DUMESTRE THOMPSON, CLAUDIA DUMESTRE, AND JEANNE DUMESTRE

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

THE SUCCESSION OF MRS. EARLINE ANN DONIER, ET AL

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

BESSIE N. ALCUS, MACK O. TEETOR, JR., AND CHARLES KOHLMEYER, JR.

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

CLEVELAND M. DUVIC, ET AL

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

KENNETH J. HARTWEIN, AS TESTAMENTARY EXECUTOR OF THE SUCCESSION OF GERTRUDE B. HARTWEIN

versus

THE CITY OF NEW ORLEANS, ET AL

consolidated with

SUCCESSION OF CLARENCE R. CASTER, SR., CLARENCE R. CASTER, JR., DONALD J. CASTER AND WINNIFRED CASTER MCCRARY

versus

THE CITY OF NEW ORLEANS, ET AL

consolidated with

FIRST NATIONAL BANK OF COMMERCE IN NEW ORLEANS AS EXECUTOR OF THE SUCCESSION OF MRS. IDA LISE BLACK RODGERS

versus

THE CITY OF NEW ORLEANS, ET AL

consolidated with

LELIA T. MORROW, AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF ROBERT PROSSER MORROW, JR., M.D.

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

SUCCESSION OF MRS. ETHEL S. MANN,
WIDOW OF RICHARD IRVING ALCUS,
MRS. SUZANNE ALCUS MANN AND LEON S. MANN

versus

CITY OF NEW ORLEANS, ET AL

consolidated with

BENNETT E. POWELL, SR., INDIVIDUALLY,
AND AS EXECUTOR OF THE SUCCESSION OF
VERNON EDWARD POWELL

versus

THE CITY OF NEW ORLEANS, ET AL

consolidated with

LUCILLE MARY RUSSELL, WIDOW
OF ORMOND MARX DE LONG

versus

CITY OF NEW ORLEANS, ET AL

Appeal from the Civil District Court, Parish of Orleans
Judge Revius O. Ortique, Jr., Presiding

JUSTICE LEMMON

These consolidated cases are before the court on a direct appeal from a judgment of the district court declaring unconstitutional a series of ordinances by the City of New Orleans that levied a municipal inheritance tax. La. Const. art. V, § 5(D).

Facts

Ordinance No. 11,262, which was adopted on July 10, 1986, imposed a tax on "all inheritances, legacies, donations and gifts made in contemplation of death" resulting from deaths that occurred on or after July 15, 1986. The tax was levied on the transfer of all immovables and

tangible movables physically situated in Orleans Parish - "whether owned or inherited by, or bequeathed, given or donated to a resident of [sic] nonresident, and whether inherited, bequeathed, given or donated under the laws of this state or of any other country". Also taxed was the transfer of all tangible and intangible movables owned by an Orleans Parish domiciliary, wherever the movables were situated. The ordinance further established rates and exemptions which varied with the relationships between the decedents and their heirs or legatees. Under this ordinance the tax became due and owing at the time an inheritance tax return was filed with the State Collector of Revenue.

Ordinance No. 11,262 was subsequently amended and reenacted by Ordinances Nos. 11,337 and 12,147, adopted on August 7, 1986, and December 10, 1987 respectively. The second and third ordinances were made retroactive to July 15, 1986, the effective date of the first ordinance.

The second ordinance altered the rates of taxation, exempted usufructs of surviving spouses, and provided for a conditional expiration date of December 31, 1986. The ordinance further stated that the "levy of the tax shall take effect at the moment of death". However, the ordinance also carried over the provision that the tax shall become due and owing at the time an inheritance tax return is filed.

The third ordinance was identical to the second except that it did not contain an expiration date.

The plaintiffs in these consolidated cases, who are the heirs and legatees of persons that died after July 15, 1986,

challenged the taxing ordinances on a number of constitutional, statutory and procedural grounds. They paid the taxes under protest and filed actions for declaratory judgments seeking to determine the validity of the ordinances. The State of Louisiana intervened, contending that the City was not authorized to levy an inheritance tax.

All parties stipulated that there were no issues of fact to be resolved. The cases were tried on cross motions for summary judgment.

The district court rendered judgment declaring the ordinances unconstitutional. In reasons for judgment the court ruled that the ordinances violated La. Const. art. III, §12(A)(2), which prohibits the Legislature from passing a local or special law "changing the law of descent or succession", and La. Const. art. VI, §9(A), which prohibits local governmental subdivisions from enacting "an ordinance governing private or civil relationships". Although other of plaintiffs' arguments were discussed, the court stated that the other issues were moot.

The City filed this appeal, and plaintiffs answered the appeal.[1]

---

[1] The judgment of the lower court granted plaintiffs the totality of the relief sought, that is, declaration of unconstitutionality of the ordinances. Although the district court did not rule on all of plaintiffs' arguments attacking the ordinances, it was not necessary for plaintiffs to answer the appeal in order to preserve their right to present these alternative arguments in support of the judgment. An appellee need only answer the appeal when he seeks to *attack* or *modify* some portion of the

(Continued on following page)

Because we reverse the major portion of the judgment of the district court, we first discuss the source of the City's taxing power and then discuss separately each of plaintiffs' attacks on the ordinances.

The City's Taxing Power

La. Const. art. VI, §30 provides:

> A political subdivision may exercise the power of taxation, subject to limitations elsewhere provided by this constitution, under *authority granted by the legislature* for parish, municipal, and other local purposes, strictly public in their nature. This Section shall not affect similar grants to political subdivisions under self-operative sections of this constitution. (emphasis added).

The City of New Orleans is governed by a Home Rule Charter originally enacted by Acts 1912, No. 159, and constitutionally recognized by La. Const. art. XIV, §22 (1921).[2] Act 159 of 1912 was amended and reenacted by Acts 1936, No. 338, which provided in Section 1(f):

> The City of New Orleans *shall have the right to levy, impose and collect any and all kinds and classes of taxes* or license fees that may be imposed that are necessary for the proper operation and maintenance of the municipality, *provided same is*

(Continued from previous page)

judgment, but a party may assert any argument in *support* of the judgment even though he has not appealed, answered the appeal, or applied for certiorari. See Logan v. Louisiana Dock Co., 541 So.2d 182 (La. 1989); see also La. C.C.P. art. 2133, amended by Acts 1989, No. 438.

[2] A 1959 amendment to the 1921 Constitution declared the City of New Orleans "to have a home rule charter consisting of Act 159 of 1912".

> *not expressly prohibited by the Constitution of the State of Louisiana.* . . . (emphasis added).

Thus, just prior to the adoption of the 1974 Constitution, the City was authorized by the Legislature and its Home Rule Charter to levy any tax *not prohibited by the Constitution.* See Acorn v. City of New Orleans, 377 So.2d 1206 (La. 1979). When the 1974 Constitution was adopted, the City's previous Home Rule Charter provisions were continued in effect by La. Const. art. VI, §4, which specifically provided that every existing home rule charter entity retained the powers, functions, and duties in effect at the time of adoption which were *not inconsistent with the Constitution.*[3]

The City thus argues that it retained, after the adoption of the 1974 Constitution, the power to levy any and all kinds and classes of taxes not prohibited by or inconsistent with the Constitution. On the other hand, plaintiffs argue that the City lacked the power to levy an inheritance tax at the time of adoption of the 1974

---

[3] La. Const. art. VI, §4 provides:

> Every home rule charter or plan of government existing or adopted when this constitution is adopted shall remain in effect and may be amended, modified, or repealed as provided therein. *Except as inconsistent with this constitution,* each local governmental subdivision which has adopted such a home rule charter or plan of government *shall retain the powers, functions, and duties in effect when this constitution is adopted.* If its charter permits, each of them also shall have the right to powers and functions granted to other local governmental subdivisions. (emphasis added).

Constitution and therefore had no power in that respect to be retained by Section 4 of Article VI.

The basis of plaintiffs' argument is that the 1921 Constitution specified a maximum rate of inheritance tax on the three classes of beneficiaries and that the state inheritance tax at the time of the adoption of the 1974 Constitution was being levied at the maximum rate for the first class and near the maximum for the other two. Plaintiffs thus contend that since the City could not have levied an inheritance tax just prior to the adoption of the 1974 Constitution, the City continued to lack the power to do so after the adoption, and La. Const. art. VI, §4's provision for retaining the home rule powers is not applicable.

We disagree. At the time of adoption of the 1974 Constitution, the City had the full power to levy any tax not prohibited by or inconsistent with the Constitution. Acorn v. City of New Orleans, 377 So.2d 1206 (La. 1979). This power included the power to levy an inheritance tax, if not otherwise prohibited by or inconsistent with the Constitution. The limitation on the total amount of inheritance tax did not divest the City of its power to levy such a tax, but rather imposed a temporary bar to the use of that power as long as the state tax was at the maximum allowed rate. The basic power to levy an inheritance tax continued when the 1974 Constitution became effective.[4]

---

[4] The provision for the maximum rate was made statutory by La. Const. art XIV, §16(A)(7) and then repealed by Acts 1975, No. 159, after which there was no longer any limitation on the City's power to levy an inheritance tax.

We therefore conclude that the City retained the power to levy an inheritance tax when the 1974 Constitution was adopted, as long as the tax was not otherwise prohibited by or inconsistent with the Constitution.[5]

Violation of Louisiana Constitution

Plaintiffs contend that a municipality is constitutionally prohibited from levying an inheritance tax.

When the framers of the 1974 Constitution intended to prohibit a local governmental subdivision from levying a specific type of tax, they did so in unambiguous terms. Article VII, pertaining to Revenue and Finance, contains an express prohibition in the clearest terms against a municipality's levying of severance taxes, income taxes, and taxes on motor fuel. La. Const. art. VII, §4(C); see City of New Orleans v. Scramuzza, 507 So.2d 215 (La. 1987). There is no such express prohibition against a municipal inheritance tax. Nevertheless, an ordinance levying a specific type of tax may still be inconsistent with and violative of another provision of the Constitution.

Plaintiffs contend that the ordinances violate La. Const. art. III, §12(A)(2)'s prohibition against the Legislature's passing local or special legislation changing the

---

[5] The decision in the Town of Wytheville v. Johnson's Executor, 108 Va. 589, 62 S.E. 328 (Va. 1908), relied on by the trial court, does not suggest a different result. In that case the Town's legislative authority to levy taxes contained an extensive list of authorized taxes, but an inheritance tax was not included in the list. The grant of authority in the present case was to levy *all* taxes not prohibited by or inconsistent with the Constitution.

law of descent or succession.[6] Plaintiffs argue that the transmission of property upon the death of the owner to an heir or legatee is a privilege (not a right) which only the State can regulate by a general law and that imposition of a municipal inheritance tax infringes on the State's power to regulate that privilege. Quoting from McCulloch v. Maryland, 17 U.S. 316 (1819), that "the power to tax is the power to destroy", plaintiffs assert that taxation represents the ultimate form of regulation. Plaintiffs further argue that regulation of descent and distribution is a unique area of regulation which requires statewide uniformity.

The contention that the sole power of one legislative body to regulate descent or succession precludes a separate legislative body from levying an inheritance tax was raised in Knowlton v. Moore, 178 U.S. 41 (1900), in which the original federal inheritance tax was challenged on the basis that the several states had the sole power to regulate successions. The Court stated:

---

[6] La. Const. art. III, §12(A)(2) provides:

> (A) Except as otherwise provided in this constitution, the legislature shall not pass a *local or special law:*
>
> . . .
>
> (2) Changing the names of persons; authorizing the adoption or legitimation of children or the emancipation of minors; affecting the estates of minors or persons under disabilities; granting divorces; *changing the law of descent or succession;* giving effect to informal or invalid wills or deeds or to any illegal disposition of property. (emphasis added).

[T]he fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the state to regulate the devolution of property upon death. *The thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest, is the transmission or receipt, and not the right existing to regulate.* In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the states to tax objects which are confessedly within the reach of their taxing power, and also excludes the national government from almost every subject of direct and many acknowleged objects of indirect taxation. . . . It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. *Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate.* This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 431, 4 L.ed. 607, "that the power to tax involves the power to destroy." This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such

> right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system *both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other,* for if it did there would practically be an end of the dual system of government which the Constitution established.

Id. at 59-60 (emphasis added).

The Court accordingly held that the transfer of property upon death is a usual subject of taxation and one which falls within the common authority of Congress and the several states, although the latter have the sole authority to regulate the devolution of property upon death.

The ordinances at issue in this case, like the legislation levying the federal inheritance tax at issue in the *Knowlton* case, in no way change the law of descent or succession. The ordinances do not attempt to regulate, or

in any manner to change the existing regulations of, the devolution of property upon death. They simply tax the event of transmission and receipt of property upon death. Although the value of the inheritance received by the heirs and legatees under succession law is lessened by the tax, there is no infringement on the state's right to regulate the law of descent or succession. Moreover, while statewide uniformity is required in the law of descent and succession, there is no requirement that the levying of an indirect tax on the transmission and receipt of property upon death be uniform throughout the state.

Plaintiffs further argue that the ordinances violate La. Const. art. VI, §9's prohibition against enacting an ordinance governing private or civil relationships.[7] Plaintiffs' Section 9 argument is essentially twofold: (1) the ordinances infringe on the State's exclusive power to govern private or civil relationships, and (2) since an inheritance tax is not really a tax, the ordinances were enacted in the exercise of the City's police power rather than its taxing power, resulting in the abridgement of the State's police power.

As to infringement on the State's exclusive power, the trial court interpreted Section 9(A) as reserving to the

---

[7] La. Const. art. VI, §9 provides in full:

> (A) No local governmental subdivision shall (1) define and provide for the punishment of a felony; or (2) except as provided by law, enact an ordinance governing private or civil relationships.
>
> (B) Notwithstanding any provision of this Article, the police power of the state shall never be abridged.

State the exclusive right to deal with felons in the criminal field and with private or civil relationships in the civil field. We agree with this interpretation, but we disagree that the ordinances interfere with the State's right to govern private or civil relationships.

The Legislature has enacted codes and statutes governing private and civil relationships in such areas as persons, property, obligations, successions, donations, matrimonial regimes, delictual responsibility, prescription, sales, leases, partnerships, corporations, mortgages, trusts, insurance, banking and many other areas. These laws include regulation of the transmission and receipt of property upon the death of the owner. The ordinances at issue do not attempt to govern any of the relationships established by the Legislature.[8] Just as the ordinances do not infringe on the State's exclusive right to regulate the law of descent or succession, they do not infringe on the State's exclusive right to govern private and civil relationships. (Indeed, the grant to the State of the exclusive

---

[8] The Civil Code governs the ownership of property, but the Constitution permits a local service charge on owners of immovables, Acorn v. City of New Orleans, 377 So.2d 1206 (La. 1979), and a local road use charge on owners of automobiles, Acorn v. City of New Orleans, 407 So.2d 1225 (1981). The Civil Code also regulates sales, but the Constitution permits local sales taxes. See Mouledoux v. Maestri, 197 La. 525, 2 So.2d 11 (1941), in which this court was presented with an attack on a municipal sales tax (one of the first in the nation) and applied Act 338 of 1936 to confirm the City's right to impose any tax not prohibited by the Constitution or preempted by state law.

right to govern private and civil relationships is a corrollary (sic) to the grant of the State's exclusive right to regulate (by general law only) the law of descent or succession, as well as the other rights specifically withheld from local regulation by La. Const. art. III, §12.) The ordinances simply serve as a revenue-raising measure imposed on the transmission and receipt of an estate. While the value of the inheritance is affected, the right to regulate the private and civil relationships between the owner of property and his heirs or legatees is not.

As to the contention that an inheritance tax is not really a tax enacted under the City's taxing power, plaintiffs cite Succession of Barr, 250 La. 141, 194 So.2d 726 (1966), in which this court stated that an inheritance tax is "not a tax proper", but "a bonus or premium exacted by the sovereign on the transmission of an estate". *Id.* at 727. On the basis of this language, plaintiffs argue that the City is attempting to regulate the transmission of an estate by ordinances which abridge the police power of the State.

The *Barr* case must be analyzed to determine its holding and the applicability of that holding to this case. The opinion should not be searched for language that was unnecessary to the decision, but may suit a party's interest in subsequent litigation.

The issue in the *Barr* case was whether the application of the state inheritance tax to mineral and royalty interests in the decedent's estate violated the constitutional prohibition against imposition of additional taxes on "oil, gas or sulphur leases", a prohibition which was clearly against the levying of additional property taxes.

The court held that there was no violation of the constitutional prohibition. While the majority used such language as "death duty", "excise", and "premium or bonus" to avoid classifying the levy as a tax at all, the three concurring justices applied the correct reasoning that the tax on inheritances was a tax on the transmission by inheritance rather than a property tax.[9] Interestingly the author of the majority opinion voted to grant a rehearing, leaving the decision as doubtful precedential value. Moreover, the key question in *Barr* was not whether the taxing authority had the power to levy an inheritance tax at all, but whether certain property was subject to the undisputedly valid tax. We therefore do not find *Barr* helpful to the resolution of any issues in this case.

The imposition of an inheritance tax is an exercise of the government's taxing power. Knowlton v. Moore, 178 U.S. 41 (1900). La. Const. art VI, §9 addresses the police power (not the taxing power) of the State and of local governmental subdivisions.[10] Police power encompasses

---

[9] An inheritance tax is not a tax on property, but rather on the transmission of property upon the death of the decedent. See Succession of Henderson, 211 La. 707, 30 So.2d 809 (1947), in which this court noted that an estate tax payable by the estate is a tax on the transmission of the entirety of the estate property at death, while an inheritance tax payable by each heir or legatee is a tax on the transmission of the component parts of the estate at death. The original federal inheritance tax was held to be an indirect tax on the transfer of property and not a direct tax on property. Knowlton v. Moore, 178 U.S. 41 (1900).

[10] Article VI provides the powers and limitations of local government. Sections 1 through 8 set forth home rule powers, while Section 9 provides limitations on those powers. Later sections of Article VI address taxing powers and limitations.

the protection of the health, welfare and property of the citizens and the preservation of good order and public morals. Fernandez v. Alford, 203 La. 111, 13 So.2d 483 (1943). Section 9(A) imposes absolute prohibitions on a local governmental subdivision's exercise of its police power, prohibiting the creation or punishment of felonies and the establishment or revision of private or civil relationships. Section 9(A) does not purport to strip the subdivision entirely of its police power, but simply sets forth specific limitations in certain areas. On the other hand, Section 9(B) applies when there is a conflict between a subdivision's otherwise valid police power measures and those of the State, in which case the latter shall prevail. See City of New Orleans v. State, Department of Corrections, 364 So.2d.1020 (La. 1978), in which the City's exercise of its police power in adopting zoning ordinances was required to yield to the State's exercise of its police power in utilizing a state-owned building to house convicted felons.

There is an important distinction between a local governmental subdivision's exercise of its police power and its exercise of its taxing power. Audubon Insurance Company v. Bernard, 434 So.2d 1072 (La. 1983); 1 T. Cooley, The Law of Taxation §27 (4th ed. 1924). The power to levy a fee under the police power is separate and distinct from the power to levy a tax under the taxing power. The former is the power to regulate, while the latter is the power to tax. Acorn v. City of New Orleans, 407 So.2d 1225 (La. 1981).

The ordinances in this case, adopted solely for the purpose of raising revenue, clearly involve the exercise of

the City's taxing power. We therefore conclude that the ordinances do not abridge the Police power of the State.

Equal Protection

Plaintiffs contend that the ordinances violate the equal protection guarantees of the United States and Louisiana Constitutions. Citing Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946) for the proposition that an individual is protected from state action which subjects him to taxes not imposed on others of the same class, plaintiffs point out that heirs and legatees of other Louisiana domiciliaries pay nothing more than the state inheritance taxes and yet receive the same benefits of Louisiana succession laws.[11] In the same vein the trial court noted that, because of the tax, the citizens of the other sixty-three parishes enjoy greater benefits from the State's regulation of successions.

Differences in the treatment, selection or classification of persons or property may be permitted so long as the discrimination is not invidious, unreasonable, or oppressive, but is founded on just and equitable distinctions. Acorn v. City of New Orleans, 377 So.2d 1206 (La. 1979). The purpose of the ordinances in this case was to raise revenues to finance the operation of the City, including the provision of those basic services that protect and enhance the value and usefulness of property located in

---

[11] The proposition cited from *Hillsborough* is a basic statement of equal protection law. The issue in *Hillsborough* was whether the taxpayer's limited remedy in state court to proceed against other members of his class for an increase in their taxes was an adequate remedy.

the City and enhance the quality of life for persons domiciled in the City. The ordinances do not invidiously, unreasonably or oppressively discriminate among the successions of persons domiciled in the City or among succession properties located in the City, but rather treat all similarly situated successions and succession properties in a wholly (sic) uniform fashion. An inheritance tax imposed by a municipality on the transmission or receipt of succession property located in, or owned by persons domiciled in, that city is not unreasonably discriminatory simply because no such tax or a lesser tax is imposed on property or persons in neighboring cities or parishes.

Due Process

Citing Miller Brothers Co. v. Maryland, 347 U.S. 340 (1954), plaintiffs point out that "due process requires some definite link, some minimum connection between the taxing authority and the person, property, or transaction it seeks to tax". *Id.* at 344-45. Plaintiffs argue that just as due process would be violated by the City's levying a sales tax on sales in Caddo Parish, there was a due process violation when the City levied an inheritance tax on property whose only relationship to the benefits and protections offered by the City was the domicile of the property owner at the time of his death. The focus of plaintiffs' attack is the City's attempt to extend the tax to (1) the transfer of tangible movables owned by parish residents which had acquired a tax situs elsewhere at the

time of the owner's death and (2) the transfer of intangible movables.[12]

The Due Process Clause of the United States Constitution dictates that the sole authority to tax the transmission of real property or tangible personal property upon the death of the owner is vested in the state where the property is located at time of death. See Foreign-held Bonds, 82 U.S. (15 Wall) 300 (1872) (holding that the taxing power of a state is limited to property within its jurisdiction); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905) (extending the protection for real property to tangible personal property); Frick v. Pennsylvania, 268 U.S. 473 (1925) (extending the *Union Refrigerator* rationale of property taxation to taxes on the transfer of property upon the death of the owner); Note, *Due Process Limits on State Estate Taxation: An Analogy to the State Corporate Income Tax*, 94 Yale L. J. 1229 (1985). In Frick v. Pennslyvania, *supra*, the state of the decedent's domicile attempted to levy an estate tax on tangible personal property which had an actual situs in another state at the time of the owner's death. The Court held that a tax on such property or on the transfer of such property at the death of the owner contravenes due process of law. See also Treicher v. Wisconsin, 338 U.S. 251 (1949).

---

[12] The scheme of the City's taxing ordinances divides the property subject to taxation upon transmission at death into four categories: (1) immovables situated in the City, (2) tangible movables situated in the City, (3) tangible movables owned by a City domicilliary, wherever situated, and (4) intangible movables owned by a City domicilliary, wherever situated. Plaintiffs do not contest the tax (if otherwise valid) as to immovables and tangible movables situated in the City.

By analogy to the *Frick* decision's application of due process principles to a state inheritance tax on tangible movables with a situs outside the state, we hold that the ordinances violate due process insofar as they attempt to levy a tax on tangible movables which had acquired a situs outside the City at the time of the owner's death, even though the owner is domiciled in the City at the time of death.[13] Nevertheless, it is unnecessary to declare that the ordinances are unconstitutional in their entirety. The offensive part of the ordinances is severable and may be stricken without affecting the remaining provisions.

As to intangibles plaintiffs argue that the multi-jurisdiction problems inherent in the tax are highlighted by the levy on intangibles because the Supreme Court in Curry v. McCauless, 307 U.S. 357 (1939) recognized that more than one state may impose death taxes on intangible property.

In this case the court is called upon to determine the validity, not the wisdom or the simplicity, of the ordinances. The taxing authority of the domicile of the owner of intangible property may validly levy a death tax on such property. Blodgett v. Silberman, 277 U.S. 1 (1927). This taxing power is not affected by the fact that some other jurisdiction also may constitutionally levy such a tax. The City's constitutional and legislative authority to

---

[13] The language of the ordinances at issue tracks that of the state inheritance tax law. Scholarly commentary has suggested that the State cannot constitutionally tax tangible movables which are located outside Louisiana. L. Oppenheim, 10 Louisiana Civil Law Treatise: Successions and Donations §262 (1972) (Part VI by M. Nathan).

levy an inheritance tax on the transmission of intangibles owned by City domiciliaries at the time of death is not affected by the possibility that another city or parish may attempt to levy a similar tax (presumably by claiming the decedent was domiciled there).[14]

Preemption

Plaintiffs contend that the State has so pervasively legislated in the field of death taxation as to preempt the field, thus prohibiting the City from exercising any taxing authority in the area.

---

[14] The danger of taxation by several states is slight because the individual states have almost uniformly chosen to use the state of the decedent's domicile to levy death taxes. Note, *Due Process Limits on State Estate Taxation: An Analogy to the State Corporate Income Tax*, 94 Yale L. J. 1229 (1985). However, the danger of multiple taxation does exist, principally because more than one state may claim that the decedent was a domicilliary at the time of death. See In re Dorrance's Estate, 309 Pa. 151, 163 A. 303, *cert. denied* 287 U.S. 660 (1932), and Dorrance v. Martin, 116 N.J.L. 362, 184 A. 743, *cert. denied* 298 U.S. 678 (1936), which resulted in the levy of separate estate taxes by two states. Nevertheless, the danger of multiple taxation is practically non-existent in state courts because domicile is generally a question of state law. (In the *Dorrance* litigation there were actions filed in two states. In each of the two separate actions the state court found that the taxing authority had produced sufficient evidence to form a reasonable basis for the finding of the fact of domicile. Such a finding by a state court was essentially unreviewable in the federal courts.) If two Louisiana district courts reach conflicting decisions on domicile in separate municipal inheritance tax cases, an appellate court has the authority to resolve the conflict which the parties will undoubtedly point out.

The doctrine of preemption evolved because the Supremacy Clause of the United States Constitution requires that federal law override state regulation in case of conflict in legislation. In effect, legislation by a superior legislative body preempts that by an inferior body when the two conflict. Preemption may be express or implied. Most litigation, of course, involves contentions of implied preemption, and the courts are called upon to determine the legislative intent of the superior body.

In the federal sphere, when Congress has not expressly provided for federal preemption, the courts determine Congressional intent by examining the pervasiveness of the federal regulatory scheme, the need for national uniformity, and the danger of conflict between the enforcement of state laws and the administration of federal programs. Pennsylvania v. Nelson, 350 U.S. 497 (1956); J. Nowak, R. Rotunda & J. Young, Constitutional Law §§9.2, 9.4 (3d ed. 1986). Nevertheless, the exercise of federal supremacy is not lightly to be presumed. New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973). This court has also recognized that state power is not preempted unless it was the clear and manifest purpose of Congress to do so or the exercise of dual authority is repugnant to the Congressional objective. Poche v. Avondale Shipyards, Inc., 339 So.2d 1212 (La. 1976).

In the state sphere the courts usually determine preemption by similar analyses.

Plaintiffs rely on Rollins Environmental Services v. Iberville Parish Police Jury, 371 So.2d 1127 (La. 1979), which held that the need for the State to coordinate

federal and state environmental control regulations had prompted the Legislature to act in a number of significant ways that precluded local regulations in the area. Plaintiffs argue that the need to coordinate state and federal death tax regulations prompted the Legislature to preempt the field in order to avoid an undesirable burden on taxpayers.

There is no express constitutional, codal or statutory provision granting the State the sole power to levy an inheritance tax.[15] Plaintiffs' preemption argument therefore turns on the determination of an implied legislative intent for the State to preempt the field of death taxation.[16]

Plaintiffs point out that the State has enacted a comprehensive system of death taxation consisting of an inheritance tax under La. R.S. 42:2401 et seq. and an estate transfer tax under La. R.S. 42:2431 et seq.[17]

---

[15] As stated earlier, the framers of the Constitution, when they desired to grant sole taxing authority to the State in certain areas (such as income taxation), did so in the clearest terms. See La. Const. art. VII, §4(C).

[16] Preemption is more frequently involved in the exercise of police power rather than taxing power. Much of plaintiffs' argument on preemption relates to the purported conflict between the ordinances and the State's exercise of its police power, which was discussed extensively in this opinion in the treatment of the asserted violation of La. Const. art. VI, §9. See also City of New Orleans v. State, Department of Corrections, 364 So.2d 102 (La. 1978).

[17] The Internal Revenue Code provides a credit for *state* death taxes against the amount of estate taxes owed to the federal government.

(Continued on following page)

Plaintiffs assert that the levy of a local inheritance tax completely disrupts the State's comprehensive scheme of death taxation because there is neither a credit nor a deduction for municipal death taxes. Thus, according to plaintiffs, the municipal inheritance tax results in unintended multiple taxation on the same property.

Consideration of the criteria for determining intent to preempt in Pennsylvania v. Nelson, *supra* does not support a finding of implied preemption. First, the State's death taxation system is not so pervasive as to indicate a legislative intent to preempt the field. There is simply no indication in either the state inheritance tax laws or the estate transfer tax laws of any legislative intent for the State to preempt the field of death taxation to the exclusion of local governmental subdivisions. The mere fact that the superior legislative body has enacted legislation in an area does not necessarily imply an intent to preempt. Nor is the area of death taxes one in which there is

---

(Continued from previous page)

The estate transfer tax was enacted by the Louisiana Legislature in 1932 in order to take advantage of the total amount of credit allowed on federal estate tax returns for state inheritance taxes. The practical effect of the tax was to utilize any unused portion of the federal estate tax credit.

The estate transfer tax is the difference between the amount of federal credit and the amount of state inheritance tax. Thus, when the federal credit is greater than the state inheritance tax, the estate transfer tax channels the difference in amount to the State, with no resulting increase in the total taxes paid by the estate. But when the state inheritance tax exceeds the federal credit, no estate transfer tax is levied.

such an inherent need for pervasive action by the higher legislative body as there was in regulation of environmental quality, a matter of broad national and state concern.

Second, the State did not occupy the field because of any need for statewide uniformity in death taxes. The purpose of the enactment of the estate transfer tax was not to achieve statewide uniformity in death taxes, but to secure funds for the State which would otherwise go to the federal government.

Finally, there is no danger of conflict between the enforcement of local tax levies and the administration of the State's death taxation program.[18] The levy of a municipal inheritance tax does not prevent the State from continuing to take complete advantage of the federal credit for state death taxes. Inasmuch as taxpayers cannot take a credit for municipal inheritance taxes on the federal estate tax return, there will be no less revenue for the State resulting from the levy of a municipal inheritance tax. Of course, the taxpayers will incur additional taxes when a municipal inheritance tax is levied, but this would also occur if the state or the federal tax rate were

---

[18] The *Rollins* case turned in part on a conflict between the exercise by the police jury of its police power and the State's regulation of environmental quality. This court stated, "[i]t is apparent that the substances the State has chosen to regulate are the same substances prohibited in the . . . ordinance". *Id.* at 1134.

increased or if the federal tax credit were decreased or repealed.[19]

Due Date of Taxes

Plaintiffs contend that the ordinances conflict with state law because the tax, being due at the moment of death, may be levied on any heir or legatee regardless of whether such heir or legatee accepts the succession.[20]

---

[19] The federal tax credits are purely a matter of legislative grace and can be repealed by Congress at any time. New Colonial Ice Co. v. Helvering, 292 U.S. 434 (1934). Withdrawal of the federal credit would not affect the right of the several states to impose an inheritance tax. See Estate of Fasken, 19 Cal.3d 412, 563 P.2d 832, 138 Cal. Rptr. 276, *cert. denied*, 434 U.S. 877 (1977). In *Fasken*, the California Supreme Court held that when an estate consists of multistate property, each of several states may levy an inheritance tax measured by the property within that state's boundaries, the amount of which tax is not limited by or otherwise dependent in any way on the federal credit for state death taxes. However, the court noted that a state making a claim to the credit differential created by federal estate tax law is limited to that portion attributable to property within that state. The court further stated that even a single state may levy and collect, without raising a jurisdictional question, an inheritance tax which by itself exceeds the federal credit.

[20] In the consolidated case of First National Bank of Commerce in New Orleans as Executor of the Succession of Mrs. Ida Lise Black Rodgers v. City of New Orleans, the decedent's property was inherited by her spouse and son. Both the spouse and the son died before the inheritance tax return was filed. Plaintiffs emphasize that if the tax is imposed at the moment of death, rather than at the time the state tax return is filed, the heirs and legatees of the spouse and son would be subject to two separate taxations.

Plaintiffs argue that the tax is inconsistent with the codal concept of seizin.

Section 28A-1 of the second and third ordinances provides that "[t]he levy of the tax shall take effect at the moment of death". Section 28A-6 provides that the tax "shall become due at the time at which an inheritance tax return is filed with the Collector of Revenue of the State of Louisiana".

Under La. C.C.P. art. 944 the heir of the decedent succeeds of *right* to the succession of the decedent from the moment of death, so that the right of the heir may be transmitted to his own heirs, whether or not the decedent's heir accepted the succession or even had knowledge of its benefits. However, the state inheritance tax is not enforceable until the decedent's heir's *right of seizin in law* is merged into *seizin in fact* of a particular property. Succession of Martin, 234 La. 566, 100 So.2d 509 (La. 1958).

The effective time of the levy stated in the municipal inheritance tax ordinances does not necessarily prescribe the time of imposition of the tax. Section 28A-1 may be reasonably interpreted so that the tax is valued as of the moment of death, but is not enforceable until the tax becomes due. Another section of the ordinances specifies the time at which the taxes become due, which is the time the inheritance tax return is filed. Only an heir or legatee who accepts the succession would file such a return.

The State's scheme of inheritance taxation is tied directly to the civilian concept of seizin. The City's scheme of inheritance taxation parallels that of the State and is consistent with the Louisiana concept of seizin.

The only heirs who are subject to either inheritance tax are heirs who have not only seizin in law, but also seizin in fact.

Expiration Date

Plaintiffs contend that the second ordinance expired by its own terms on December 31, 1986. The expiration provision of the second ordinance stated:

> [T]he tax imposed by this chapter shall terminate on December 31, 1986 if the electors of the City of New Orleans approve the levy of a real property service charge at an election to be held on September 27, 1986, however, should the electors fail to approve the levy of a real property service charge at said election, the tax herein provided for shall continue in full force and effect as to inheritances, legacies, donations and gifts made in contemplation of death from those persons whose death occurred on or after July 15, 1986 *until aforesaid date of expiration* and shall be paid as provided in Section 28A-6 of this chapter. (emphasis added).

By the express terms of the ordinance the tax expired on December 31, 1986 *only* if the voters approved the real property service charge, a condition which did not occur. When the service charge election failed, the tax "continue[d] in full force and effect" under the express terms of the ordinance. The phrase "until aforesaid date of expiration", while confusing, cannot reasonably be construed, as plaintiffs suggest, to fix an expiration date of December 31, 1986, regardless of the outcome of the service charge election. Such a construction of the three-word phrase would totally frustrate the obvious purpose of the entire provision, which clearly was to terminate the

tax if the other source of revenue was forthcoming, but to continue the tax if the other source of revenue failed to materialize. Despite the confusing phrase noted above, any other interpretation would be absurd. We therefore conclude that the second ordinance did not terminate on December 31, 1986.

Procedural Deficiencies

Plaintiffs contend that the City failed to comply with the notice requirements of the Home Rule Charter in adopting the first inheritance tax ordinance.

Section 3-112(5)(a) of the Home Rule Charter provides:

> (5) Proposed ordinances of any of the following specified subjects can be adopted only at a regular meeting of the Council and shall not be adopted until at least twenty-one days after copies thereof shall have been distributed to all members of the Council and made available to the public, nor until a *notice of the introduction of such proposed ordinance shall have been published in the official journal of the City not less than one week nor more than two weeks after the introduction thereof, which notice shall state the substance of the proposed ordinance and the date of the meeting at which the Council shall begin its consideration thereof,* to wit:
>
> (a) *Levying any tax or excise* not imposed at the effective date of this Charter, or increasing the rate of any tax or excise. (emphasis added).

The first ordinance was introduced at the Council meeting of June 19, 1986 as a proposed amendment to the City Code, enacting Chapter 28A thereof. Notice of the

introduction of the ordinance, published within the time period required in the Charter, specified July 17, 1986, the third Thursday of July, as the date on which the proposed ordinance would be considered.

On July 7, 1986, a second notice of the introduction of the ordinance was published specifying that the Council would consider the proposed ordinance at its regular meeting of July 10, 1986. This ordinance was adopted at the July 10, 1986 meeting of the Council and was subsequently approved by the Mayor on July 14, 1986.

Procedural requirements for the enactment of ordinances contained in Home Rule Charter are mandatory, and specific adherence thereto is required. Metropolitan New Orleans Chapter of the Louisiana Consumers League, Inc. v. Council of the City of New Orleans, 349 So. 2d 400 (La. App. 4th Cir. 1977). Inasmuch as the first published notice specified the July 17, 1986 meeting date for the first consideration of the proposed ordinance, the ordinance adopted on July 10, 1986 did not comply with the notice requirement and is invalid. Moreover, the second notice was published on July 7, 1986, four days after the last date permitted for publication. The proposed ordinance also was not adopted at a regular meeting, as required by the Charter.[21] Because of these deficiencies, the ordinance adopted on July 10 was invalid and of no effect.

---

[21] Rule 1 of the Council's Rules and Regulations provides that the regular meetings shall take place on the first and third Thursdays of each month. The July 10 meeting was not a regular meeting.

The second ordinance was introduced at the Council meeting of July 17, 1986, one week after the passage of the first ordinance. Notice of the introduction of this ordinance was timely published on July 25, 1986. The ordinance was adopted by the Council on August 7, 1986, the first Thursday in August and the date stated in the notice for initial consideration. No procedural deficiencies have been pointed out as to this ordinance.

Plaintiffs argue, however, that the notice of the introduction of the second ordinance was insufficient because the notice did not "state the substance of the proposed ordinance", as required by Home Rule Charter §3-112(5)(a), with sufficient clarity so that the public could recognize the Council's intentions.

The published notices contained the following identical statements of the substance of the ordinance to be considered by the Council:

> To impose a tax upon all inheritances, legacies, donations and gifts made in comtemplation (sic) of death; to provide exemptions from said tax; to establish the rates of said tax; to provide for the collection of said tax.

Plaintiffs argue that anyone reading the notice of the introduction of the second ordinance would not be informed that the City had failed to levy a valid inheritance tax under the first ordinance, but would be led to believe that the second ordinance merely amended the earlier ordinance rather than completely enacting a new inheritance tax.

The purpose of the requirement of notice of the introduction of proposed ordinances, similar to purpose of the

title-body clause of La. Const. art. III, §15(A), is to give the lawmakers and the public fair notice of the scope of the proposed legislation, thereby affording interested persons the opportunity to assert their support or opposition and preventing surprise or fraud upon the members of the legislative body. Louisiana Independent Auto Dealers Association v. State, 295 So.2d 796 (La. 1974). The description of the object of the second ordinance completely fulfilled the purpose of the notice requirement. The lawmakers and the public were clearly put on notice that the proposed ordinance was designed to levy an inheritance tax. Furthermore, the second ordinance did not merely amend the first ordiance (which was invalid and incapable of amendment); the second ordinance, as noted in its preamble and its body, "reordain[ed] Chapter 28A of Ordinance Number 828 M.C.S. . . .to impose a tax upon all inheritances, legacies, donations and gifts made in contemplation of death . . . ." The ordinance adopted on August 7, 1986 was therefore capable of standing alone, without regard to the validity of the first ordinance.

The third ordinance was adopted on December 19, 1987, apparently in response to the present litigation. Plaintiffs contend that this ordinance was invalid because the City first proposed to enact a new tax retroactive to January 1, 1987 and later abandoned that proposal in favor of one enacting a new tax retroactive to July 15, 1986. Plaintiffs argue that the City by this procedure created such confusion that there was not substantial compliance with the notice requirements of the Charter. Because two almost identical ordinances were introduced

and advertised within a five-week period and were considered by the Council on conflicting days, plaintiffs assert that the public was not given notice of the significant differences between the two proposals, particularly as to their retroactive application.

No deficiencies in the procedural requirements of the Charter have been pointed out by plaintiffs as to the December 1987 ordinance. The fact that the first proposal was introduced and abandoned does not in itself affect the validity of the ordinance adopted after proper introduction and notice of a different proposal.

In summary we conclude that the ordinance adopted on July 15, 1986 was invalid, but that the ordinance adopted on August 7, 1986 validly levied an inheritance tax which remained in effect until Chapter 28A was validly reordained by the December 19, 1987 ordinance. The latter ordiance (sic) validly levied an inheritance tax that apparently continues to remain in effect.

Retroactivity

Several of the consolidated cases involve decedents who died between July 15, 1986, the purported effective date of the invalid first ordinance, and August 7, 1986, the date of passage of the second ordinance. Inasmuch as the transmission of the property included in these successions was not validly taxed by the first ordinance, plaintiffs attack the validity of the provision which made the second ordinance retroactive to July 15, 1986.

In Succession of Levy, 115 La. 377, 39 So. 37 (1905), *aff'd sub nom.* Cahen v. Brewster, 203 U.S. 543 (1906), the

decedent died on May 26, 1904, and his will was probated four days later. However, the succession was still under administration when the Legislature enacted an inheritance tax on June 28, 1904. The legislation provided that the tax was "to be collected on all successions not finally closed and administered upon, and all successions hereafter opened".

In response to an attack on the legislation as unconstitutionally disturbing vested rights, this court held that "the assessment and judgment for taxes against a succession, as such, are legal, when the heirs have not obtained a decree of court recognizing and putting them in possession". *Id.* at 38. The court reasoned that while the doctrine of seizin transmits property immediately upon the death of the owner to his living heirs and legatees, the succession is considered opened and unsettled until the heirs and legatees go into possession. The court noted that since the tax is a tax on the transmission of property by will or by descent, the Legislature may subject succession property to the tax as long as the succession remains in the hands of executors.

On appeal to the United States Supreme Court, the executor asserted that the decision of this court contradicted the holding of Knowlton v. Moore, 178 U.S. 41 (1900), which defined an inheritance tax as one on the transmission of property from the dead to the living. The Court rejected this contention, explaining:

> [T]hese definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or intestate. *In other words, we defined the nature of*

> *the tax; we did not prescribe the time of its imposition.* To have done the latter would have been to prescribe a rule of succession of estates and usurp a power we did not and do not possess. *There is nothing, therefore, in those cases which restrains the power of the State as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee.* "It is not," we said in the *Perkins* case, "until it has yielded its contribution to the State that it becomes the property of the legatee."

Cahen v. Brewster, 203 U.S. at 550-51 (emphasis added).

In Succession of Stauffer, 119 La. 66, 43 So. 928 (1907), the executors contended that the heirs and legatees became vested of the inheritance by operation of law immediately upon the decedent's death, which was prior to the passage of the inheritance tax statute. They argued that the vested rights could not constitutionally be affected. The court disagreed, stating:

> By the fiction of the law, *"le mort saisit le vif,"* the heir is seised of right, but not in fact, until he accepts the succession and is sent into or takes possession according to law. *As long as the property is under administration it remains in the custody of the law,* and the rights of heirs and legatees are in abeyance until the administration is closed . . . . The *transmission* of the property so received is the inheritance taxable under our Constitution and statutes. Hence until this transmission is effected the inheritance is taxable.

Id. at 929 (emphasis added).

Plaintiffs rely on Untermyer v. Anderson, 276 U.S. 440 (1928), which held that a gift tax could not be constitutionally levied on an inter vivos gift that was fully consummated prior to enactment of the taxing legislation and was not made in contemplation of death. Since the property in that case was fully vested prior to the enactment of the tax, the decision does not affect the rationale of the *Levy* and *Stauffer* cases.

The *Levy* and *Stauffer* cases, which involved an inheritance tax enacted while the succession property remained in the hands of the executor, held that the tax could be levied on the succession property without violating the Louisiana Constitution. The *Cahen* case (*Levy* on appeal) held that the states may utilize the point of transmission to the heirs and legatees by judgment of possession as the time of vesting without violating the United States Constitution. We decline to disturb the long-standing position maintained by this court since the initial enactment of the inheritance tax law.

Decree

The judgment of the district court is affirmed in part insofar as the judgment declared unconsitutional (sic) the municipal inheritance tax on tangible movables which had acquired a situs outside the City of New Orleans at the time of the owner's death. In all other respects, the judgment of the district court is reversed. The case is remanded to the district court to grant appropriate relief to those plaintiffs who are entitled to relief under this opinion.

SUPREME COURT OF LOUISIANA

NO. 88-CA-2761

SALOME HILDEBRAND, et al

versus

CITY OF NEW ORLEANS and PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS, et al

Consolidated Cases

WATSON, Justice, Dissenting:

The doctrine of preemption resolves conflicts of law in circumstances where the laws of a superior legislative body preempt those of an inferior body. Under the supremacy clause of the United States Constitution, state law is preempted by federal law when the two conflict. The system of government set out in the Louisiana Constitution of 1974 establishes the state as the primary authority and gives municipalities secondary governmental authority. Cities, like parishes and other governmental bodies, are denominated as "political subdivisions" of the state. This is "the prevalent American political theory . . . that the state antedates the municipal corporation. . . ."[1]

Preemption may be explicit or implied. Express preemption is found in the Constitution[2] and the

---

[1] 2 McQuillin, *Municipal Corporations*, Sec. 9.01 (3d ed. 1988).

[2] See, for example, Art. 6, §9 of the Louisiana Constitution of 1974 which prohibits local governmental subdivisions from enacting laws which define a felony or govern a civil relationship.

jurisprudence.[3] The Constitution grants municipalities which do not operate under a home rule charter all the authority necessary to govern which is not denied by general law.[4] The City of New Orleans is governed by a Home Rule Charter,[5] but "shall, however, not exercise any power or authority which is inconsistent or in conflict with any general law."[6] The city's inheritance tax is preempted if it is inconsistent with or in conflict with a general law of the state.

---

[3] See, for example, City of New Orleans v. State of Louisiana, 364 So.2d 1020 (La.1978). The City had acted under a constitutional provision expressly granting zoning authority to local governmental subdivisions. Nevertheless, when the state's proposed use of its facility at Jackson Barracks conflicted with the City's zoning ordinances, the city's enactments were held to be preempted by the state's exercise of its police power.

[4] Art. 6, §7, Louisiana Constitution 1974. "General law" is defined in Art. 6, §44(5) as follows:

> "General law" means a law of statewide concern enacted by the legislature which is uniformly applicable to all persons or to all political subdivisions in the state or which is uniformly applicable to all persons or to all political subdivisions within the same class.

[5] The Home Rule Charter of New Orleans was enacted by Act No. 159, La. Acts 1912. It was affirmed by Art. 14, §22 of the 1921 Constitution, amended by Act No. 338 of 1936 and Act No. 551 of 1950. It was retained by the 1974 Constitution, Art. 6, §4.

[6] Art. 14, §22, 1921 Constitution. See also Section 40(d), added by amendment to Art. 14 in 1952, stating that the general laws of the legislature are "paramount."

Implied preemption occurs when the state legislature has comprehensively regulated a certain field: when an area is occupied by state law, municipalities and other political subdivisions are preempted. It is a "settled rule that a subordinate political subdivision of the state cannot enact ordinances in a field which is preempted or occupied by the laws and Constitution of the United States or of the State of Louisiana. . . ." Rollins Environmental Serv. v. Iberville Parish, 371 So.2d 1127, 1131 (La.1979).

Rollins concerned the efforts of the Iberville Parish police jury to ban the disposal of industrial waste. It held that the field of hazardous waste disposal had been comprehensively regulated by Congress with a specified and limited role prescribed for the states. The police jury's enactments, though not in direct conflict with the federal legislation, would ultimately frustrate the congressional purpose of providing a uniform national plan for the disposal of hazardous waste. Permitting local governmental units to ban or regulate waste disposal in their jurisdictions would be an obstacle to execution of that purpose.

Rollins states a rule for determining when a field has been preempted: whether the state legislature has enacted general laws on the subject which preempt that field of regulation.[7] "It is fundamental that a municipality

---

[7] *Rollins* at 1131, citing State v. Sissons, 292 So.2d 523 (La.1974); National Foods Stores of Louisiana, Inc. v. Cefalu, 280 So.2d 903 (La.1973); City of Minden v. Davis Bros. Drug Company, 195 La. 791, 197 So. 505 (1940). Also see definition of general law at footnote 4, supra.

cannot adopt ordinances which infringe the spirit of state law, or are repugnant to the general policy of the State."[8]

Randolph v. Village of Turkey Creek, 240 La. 996, 126 So.2d 341 (1961) held that legislative intent, illustrated by detailed regulations, may show that the state has pre-empted a field.

In 1828 the State of Louisiana became the second in the nation to levy a death tax.[9] The state's proportional inheritance tax has since been amended to provide certain exemptions and to adjust reporting and collection procedures.[10] Act 119 of 1932[11] added an estate transfer tax in response to federal tax laws.

The Internal Revenue Service allows a credit for state death taxes.[12] Louisiana's estate transfer tax insures that

---

[8] City of Minden v. David Bros. Drug Co., supra, 197 So. at 508.

[9] La. Act 95 of 1828; Comment, *The Louisiana Inheritance and Estate Taxes*, 22 Tul.L.Rev. 635 (1948).

[10] LSA-R.S. 47:2401, et seq.

[11] Codified at LSA-R.S. 47:2431, et seq.

[12] 26 U.S.C. §2011 entitled "Credit for State Death Taxes,"

> (a) In general. – The tax imposed by Section 2001 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent).

the state receives the full amount of that credit.[13] Under this procedure, the taxpayer pays the state inheritance tax, then calculates any federal tax due,[14] minus the allowable credit.[15] If the federal tax credit is greater than the state inheritance tax, the difference is paid to the state as an estate transfer tax. If the federal credit is satisfied by the state inheritance tax, the taxpayer owes nothing more to the state.[16]

Some succession representatives have offset the city tax against the state credit, thus depriving the state of revenue. Alternatively, imposing the city's tax in addition to the state's tax conflicts with the state's scheme of using the federal tax credit as a ceiling on state and local taxation.

Louisiana's inheritance and estate transfer taxes constitute a comprehensive legislative scheme. The plan was expressly formulated to insure that the full amount of the

---

[13] This is a type of federal-state revenue sharing, calling for some form of coordinating legislation by the state. For example, on March 13, 1987, Nevada became the last state in the union to levy a tax on decedents' estates. The Nevada tax is equal to the allowable federal credit. Nev. Rev. Stat. §375A100 (1987).

[14] 26 U.S.C. §2001.

[15] 26 U.S.C. §2011.

[16] LSA-R.S. 47:2432(a).

federal tax credit accrues to the state's benefit.[17] The state death and estate tax scheme is a general law within the constitutional meaning. Together with federal tax law, it occupies the entire field of inheritance taxation. General laws of the state are paramount and preempt local legislation in this area.

The city inheritance tax ordinances[18] are an unconstitutional exercise of authority in an area preempted by state and federal legislation. I respectfully dissent.

---

[17] LSA-R.S. 47:2434 is entitled "Intent and Purposes of this Part" and reads:

> It is hereby declared to be the intent and purpose of this Part to obtain for this state the benefit of the estate tax credit allowed under the provisions of the United States Internal Revenue Code, to the extent that the state may be entitled under the said provisions, by imposing additional taxes. This Part shall be liberally construed to effect that purpose.

[18] No. 11, 262 M.C.S.; No. 11, 337 M.C.S.; and No. 12, 147 M.C.S.

SUPREME COURT OF LOUISIANA

NO. 88-CA-2761
(Filed Oct 19, 1989)

SALOME HILDEBRAND

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS

AND OTHER CONSOLIDATED CASES

ON APPLICATION FOR REHEARING

PER CURIAM

On application for rehearing, plaintiffs challenge this court's statement on original hearing that "[i]nasmuch as taxpayers cannot take a credit for municipal inheritance taxes on the federal estate tax return, there will be no less revenue for the State resulting from the levy of a municipal inheritance tax". Plaintiffs argue that a municipal inheritance tax is applicable to the federal credit set forth in 26 U.S.C. § 2011(a) (1982).[1] Plaintiffs argue that the word "State" in the statute includes a state and any

---

[1] 26 U.S.C. § 2011(a) (1982) provides:

> The tax imposed by section 2001 shall be credited with the amount of any estate, inheritance, legacy, or succession *taxes actually paid to any State* or the District of Columbia, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent). (emphasis added).

Calogero, J., concurs in these Per Curiam reasons and would thus deny the applications of Hildebrand, et al, and McDermott, Jr., et al; he would grant the applications of the Whitney National Bank and Richard G. Hirsch and assigns reasons.

political subdivision of the state. They therefore contend that a municipal inheritance tax, entitled to a federal credit, will result in less revenue for the State and is therefore inconsistent and in conflict with state law.

This court misspoke in discussing whether a taxpayer receives credit for municipal inheritance taxes on the federal estate tax return. However, this court's statement, whether correct or not, was not necessary to the decision. The primary focus of the decision was on the effect of a municipal inheritance tax on the Louisiana estate transfer tax.

The Legislature has levied an inheritance tax in La. R.S. 47:2401 (which is in Part I of Chapter 1 of Subtitle IV of Title 47) and an estate transfer tax in La. R.S. 47:2431 (which is in Part II). La. R.S. 47:2432A, pertaining to the amount of estate transfer tax, provides:

> Whenever there is a credit allowed under the United States Internal Revenue Code as to the amount of the federal estate tax for amount of state death taxes, the maximum amount of the credit for the state death taxes shall be paid to the State of Louisiana. However, if the state inheritance taxes paid under Part I of this chapter exceed the federal credit, no additional payment will be due under Part II of this chapter. *If the federal credit does exceed the inheritance taxes due under Part I of this chapter, then the difference between the amount of the federal credit and the amount of state inheritance tax shall be paid to the State of Louisiana.* (emphasis added).

Thus, a taxpayer must pay to the State both the state inheritance tax and the estate transfer tax, which (when the federal credits exceed the tax due under Part I) is the difference between the amount of the federal credit and

the "amount of state inheritance tax". Louisiana law requires payment to the State of both the state inheritance tax levied in Part I and the estate transfer tax levied in Part II (which together add up to the amount of federal estate tax credit for state death taxes), whether or not municipal inheritance taxes are eligible for credit on federal estate tax returns.[2] Therefore, this court correctly noted on original hearing that the levy of the municipal inheritance tax does not result in less revenue for the State.

The application for rehearing is denied.

---

[2] Thus, if a credit of $100,000 is allowed for state death taxes, and if the taxpayer has paid $40,000 in state inheritance taxes *and* $40,000 in municipal inheritance taxes, the estate transfer tax under the clear terms of La. R.S. 47:2432 is $60,000, not $20,000. The State is entitled to $60,000 in estate transfer taxes, whether or not the federal government allows a credit for municipal inheritance taxes. After the Louisiana estate transfer tax of $60,000 is paid to the State as required by law, it matters not whether the federal government would have allowed a $40,000 credit for municipal inheritance taxes. With payment of $40,000 in Louisiana inheritance tax, $60,000 in Louisiana estate transfer tax, and $40,000 in City of New Orleans inheritance tax, the full $100,000 federal credit would have been utilized by the estate.

SUPREME COURT OF LOUISIANA

NO. 88-CA-2761

SALOME HILDEBRAND, et al

versus

CITY OF NEW ORLEANS and PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS, et al

Consolidated Cases

Application for Rehearing

On appeal from the Civil District Court, Parish of Orleans
Judge Revius O. Ortique, Jr., Presiding

CALOGERO, Justice, Concurring in part and dissenting in part regarding denial of rehearing application.

I concur in denying the rehearing applications of Hildebrand, et al, and McDermott, Jr., et al, and subscribe to this per curiam opinion. However, I would grant the rehearing applications of the Whitney National Bank, Executor and Trustee under the Will of Violet Wilson Frederick and on behalf of Rose Fenasci and Carol Wilson, and Richard G. Hirsch, as Testamentary Executor of the Succession of Jeanne Godchaux, Widow of Ariel B. Newman, Jr., applications which raise a single issue, that is the contention that the city inheritance tax, as a retroactive tax, unconstitutionally discriminates against the heirs of those whose deaths occurred after enactment of the invalid first city inheritance tax ordinance and before the enactment of the second ordinance, vis-a-vis the heirs of those whose deaths occurred before enactment of the first ordinance, and deprives these heirs of vested property rights without due process of law.

ORDINANCE
(AS AMENDED)
CITY OF NEW ORLEANS

CITY HALL: June 19, 1986

CALENDAR NO. 13,368

NO. 11262 MAYOR COUNCIL SERIES

BY: COUNCILMEMBERS TAYLOR, BOISSIERE, AND EARLY (BY REQUEST)

AN ORDINANCE to amend Ordinance Number 828 M.C.S., known as the Code of the City of New Orleans by adding thereto a new Chapter to be designated Chapter 28A; to impose a tax upon all inheritances, legacies, donations and gifts made in contemplation of death; to provide exemptions from said tax; to establish the rates of said tax; to provide for the collection of said tax; and to otherwise provide with respect thereto.

SECTION 1. THE COUNCIL OF THE CITY OF NEW ORLEANS HEREBY ORDAINS, that Chapter 28A of Ordinance Number 828 M.C.S. is hereby enacted to read as follow:

CHAPTER 28A

GIFT AND ESTATE TAX

ARTICLE I. IN GENERAL

Section 28A-1 Levy of Tax

There is hereby levied a tax upon all inheritances, legacies, donations and gifts made in contemplation of death, except as such may be specifically exempted in this Chapter:

Section 28A-2 Exemptions

The following shall be exempt from the tax imposed by this Chapter:

(a) Inheritances, legacies, and donations and gifts made in contemplation of death, to a direct descendant by blood or affinity, ascendent, or surviving spouse of a decedent, to the amount or value of ten thousand dollars.

(b) Inheritances, legacies, and donations and gifts made in contemplation of death, to a collateral relation of the decedent, (including brothers or sisters by affinity) to the amount or value of one thousand dollars. (s) Legacies and donations to charitable, religious or educational institutions located within the City of New Orleans.

(c) Legacies and donations, and gifts made in contemplation of death, to a stranger, to the amount of five hundred dollars.

(d) All legacies and donations to charitable, religious or educational institutions located within the City of New Orleans.

(e) All legacies and donations to the City of New Orleans for exclusively public purposes.

Section 28A-3. Rates of Tax

A. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a direct descendent by blood or affinity, ascendant or surviving spouse of a decedent by blood or affinity, ascendant or surviving spouse of a decedent shall be computed as follows:

No tax shall be collected or be due on the first ten thousand dollars; the tax shall be two percent of the fair

market value thereof at the time of death on the next twenty thousand dollars, and three percent of such fair market value on any amount in excess of twenty thousand dollars.

B. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a collateral relation, including brothers or sisters by affinity, shall be computed as follows:

No tax shall be collected or be due on the first one thousand dollars; the tax shall be five percent of the fair market value thereof the time of death on the next twenty thousand dollars, and seven percent of such fair market value on any amount in excess of twenty thousand dollars.

C. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a stranger shall be computed as follows:

No tax shall be collected or be due on the first five hundred dollars; the tax shall be five percent of the fair market value thereof at the time of death on the next five thousand dollar, and ten percent of such fair market value on any amount in excess of five thousand dollars. Section 28A-4 Property used as measure of tax.

A. Except as provided in subsection (C) of this Section and except to the extent to the exemptions provided in Section 28A-2 of this Chapter the tax imposed by this Chapter shall be imposed with respect to all property of every nature and kind included or embraced in any inheritance legacy or donation or gift made in contemplation of death, including all immovable property and all

tangible movable property physically in the Parish of Orleans, whether owned or inherited by, or bequeathed, given or donated to a resident of (sic) non-resident, and whether inherited, bequeathed given or donated under the laws of this state or of any other state or country. The tax shall also be imposed with respect to all movable property, tangible or intangible, owned by residents of the parish of Orleans, wherever situated; provided that the tax shall not be imposed upon any transfer of intangible movable property owned by a person not domiciled in this Parish at the time of his death.

B. In the event that nay (sic) real estate is included in the estate of the decedent and is bona fide mortgaged in an amount in excess of fifty percentum of its value, in computing the equity of value of such estate for the purposes of assessing an inheritance tax, the apparent margin between the appraised value of such realty and the mortgage encumbrance thereon shall be reduced by an amount equal to twenty percentum of such encumbrance.

C. Notwithstanding the provisions of this section or of any provision of law, there shall be excluded from the property subject to the tax imposed in this Chapter any proceeds receivable by any beneficiary, conform than the estate of decedent, under an life insurance policy, or any retirement or pension plan, trust, system or policy. Retirement or pension plan, trust system or policy, as used in this subsection, means and includes any contract, agreement or arrangement under which an annuity or other payment was payable to the decedent or which the which (sic) the decedent possessed the right to receive, either alone or in conjunction with another, for his life.

Section 28A-5. Valuation of annuities or usufructs. The Director of the Department of Finance shall adopt and promulgate methods and tables which shall be used as the basis of fixing the valuation of annuities and usufructs or rights or use or habitation and which methods and tables shall conform as closely as possible to the methods and tables for fixing the evaluation of valuation of annuities and usufructs or rights of use or habitation established in Louisiana Revised Statute 47:2405 and the American Experience Table of Mortality.

Section 28A-6 Time and Place for Payment of Tax

A. The tax imposed by this Chapter shall become due and owing at the time at which an inheritance tax return is filed with the Collector of Revenue of the State of Louisiana.

B. The Director of the Department of Finance shall publish such forms as he deems necessary and proper for the remittance of the tax and the tax shall be remitted, with such form to the Department of Finance, City of New Orleans.

SECTION 2. Should any provision of this Ordinance be declared to be invalid by a court of competent jurisdiction, such declaration of invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provision, and to this end the provisions of this ordinance are hereby declared to be servable (sic).

SECTION 3. All ordinances or parts of ordinance in conflict herewith are hereby repealed.

SECTION 4. That the provisions of this ordinance shall expire on December 31, 1986.

ADOPTED BY THE COUNCIL OF THE CITY OF NEW ORLEANS JULY 10, 1986

JOSEPH I. GIARRUSSO
PRESIDENT OF COUNCIL

Delivered to the Mayor on JULY 11, 1986

Approved: JULY 14, 1986

SIDNEY J. BARTHELEMY
MAYOR

Returned by the Mayor on JULY 14, 1986 at 9:25 A.M.

EMMA WILLIAMS
CLERK OF COUNCIL

THE FOREGOING IS CERTIFIED TO BE A TRUE AND CORRECT COPY
/s/ Emma J. Williams
CLERK OF COUNCIL

ORDINANCE
(AS AMENDED)
CITY OF NEW ORLEANS

CITY HALL: July 17, 1986

CALENDAR NO. 13,439

NO. 11337 MAYOR COUNCIL SERIES

BY: COUNCILMEMBERS TAYLOR, BOISSIERE AND EARLY (BY REQUEST)

AN ORDINANCE, to amend and reordain Chapter 28A of Ordinance Number 828 M.C.S., known as the Code of the City of New Orleans; to impose a tax upon all inheritances, legacies, donations and gifts made in contemplation of death; to provide exemptions from said tax; to establish the rates of said tax; to provide for the collection of said tax; and to otherwise provide with respect thereto.

SECTION 1. THE COUNCIL OF THE CITY OF NEW ORLEANS HEREBY ORDAINS, That Chapter (sic) 28A of Ordinance Number 828 M.C.S., is hereby amended and reordained to read as follows:

CHAPTER 28A

GIFT AND ESTATE TAX

ARTICLE I. IN GENERAL

Section 28A-1. Levy of Tax

There is hereby levied a tax upon all inheritances, legacies, donations and gifts made in contemplation of death, except as such may be specifically exempted in this Chapter, provided that each such inheritance, legacy, donation and gift result from donation made or

inheritance or legacy result from death occuring (sic) on or after July 15, 1986 until the date of expiration of this Chapter. The levy of the tax shall take effect at the moment of death.

Section 28A-2. Exemptions

The following shall be exempt from the tax imposed by this Chapter:

(a) Inheritances, legacies, and donations and gifts made in contemplation of death, to a direct descendant by blood or affinity, ascendant, or surviving spouse of a decedent, as follows:

(1) To the amount of twenty thousand dollars if the death occurs during the calendar year 1986.

(2) To the amount of twnety-five (sic) thousand dollars if the death occurs during the calendar year 1987.

(b) Inheritances, legacies, and donations and gifts made in contemplation of death, to a collalteral (sic) relation of the decedent, (including brothers or sisters by affinity) to the amount or value of one thousand dollars.

(c) Legacies and donations, and gifts made in contemplation of death, to a stranger, to the amount of five hundred dollars.

(d) All legacies and donations to charitable, religious or educational institutions located within the City of New Orleans.

(e) All legacies and donations to the City of New Orleans for exclusively public purposes.

(f) All usufructs to surviving spouses whether testamentary or by operation of law.

Section 28A-3. Rates of Tax.

A. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a direct descendant by blood or affinity, ascendant or surviving spouse of a decedent by blood or affinity, ascendant or surviving spouse of a decendent (sic) shall be computed as follows:

No tax shall be collected or be due on the amount exempt by Section 28A-2(a); the tax shall be two percent of the fair market value thereof at the time of death on the next twenty thousand dollars, and three percent of such fair market value on any amount in excess of the sum of the exemption plus twenty thousand dollars provided that the tax liability of any such direct heir shall not exceed the sum of one hundred thousand dollars.

B. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a collateral relation, including brothers or sisters by affinity, shall be computed as follows:

No tax shall be collected or be due on the first one thousand dollars; the tax shall be five percent of the fair market value thereof at the time of death on the next twenty thousand dollars, and seven percent of such fair market value on

any amount in excess of twenty-one thousand dollars.

C. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a stranger shall be computed as follows:

No tax shall be collected or due on the first five hundred dollars; the tax shall be five percent of the fair market value thereof at the time of death on the next five thousand dollars, and ten percent of such fair market value any amount in excess of five thousand five hundred dollars.

D. The aforesaid exemptions shall be applied against the net estate which is determined after the deduction of all debts of the decedent and his estate, said deductions to be the same as those permitted by the State of Louisiana in the collection of its inheritance tax.

Section 28A-4. Property used as measure of tax.

A. Except as provided in Subsection (C) of this Section except as otherwise provided by law and except to the extent of the exemptions provided in Section 28A-2 of this Chapter the tax imposed by this Chapter shall be imposed with respect to all property of every nature and kind included or embraced in any inheritance legacy or donation or gift made in contemplation of death, including all immovable property and all tangible movable property physically in the Parish of Orleans, whether owned or inherited by, or bequeathed, given or donated to a resident of

(sic) non-resident, and whether inherited, bequeathed given or donated under the laws of this state or of any other state or country by a person subject to the jurisdiction of the Civil District Court for the Parish of Orleans, State of Louisiana, at the time of death. The tax shall also be imposed with respect to all movable property, tangible or intangible, owned by residents of the parish of Orleans, wherever situated; provided that the tax shall not be imposed upon any transfer of intangible movable property owned by a person not domiciled in this Parish at the time of his death.

B. In the event that any real estate is included in the estate of the decedent and is bona fide mortgaged in an amount in excess of fifty per centum of its value, in computing the equity of value of such estate for the purpose of assessing an inheritance tax, the apparent margin between the appraised value of such realty and the mortgage encumbrance thereon shall be reduced by an amount equal to twenty per centum of such encumbrance.

C. Notwithstanding the provisions of this section or of any provision of law, there shall be excluded from the property subject to the tax imposed in this Chapter any proceeds receivable by any beneficiary, other than the estate of the decedent, under any life insurance policy, or any retirement or pension plan, trust, system or policy. Retirement or pension plan, trust system, or policy, as used in this subsection, means and

includes any contract, agreement or arrangement under which an annuity or other payment was payable to the decedent or which the decedent possessed the right to receive, either along or in conjunction with another, for his life.

Section 28A-5. Valuation of annuities or usufructs. The Director of the Department of Finance shall adopt and promulgate methods and tables which shall be used as the basis of fixing the valuation of annuities and usufructs or rights or use or habitation and which methods and tables shall conform to the methods and tables for fixing the evaluation of valuation of annuities and usufructs or rights of use or habitation established in Louisiana Revised Statutes 47:2405 and the American Experience Table of Mortality.

Section 28A-6. Time and Place for Payment of Tax

A. The tax imposed by this Chapter shall become due and owing at the time at which an inheritance tax return is filed with the Collector of Revenue of the State of Louisiana.

B. The Director of the Department of Finance shall publish such forms as he deems necessary and proper for the remittance of the tax and the tax shall be remitted, with such form to the Department of Finance, city of New Orleans.

SECTION 2. Should any provision of this Ordinance be declared to be invalid by a court of competent jurisdiction, such declaration of invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provision, and to

this end the provisions of this ordinance are hereby declared to be severable.

SECTION 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 4. That the tax imposed by this Chapter shall terminate on December 31, 1986 if the electors of the City of New Orleans approve the levy of a real property service charge at an election to be held on September 27, 1986, however, should the electors fail to approve the levy of a real property service charge at said election, the tax herein provided for shall continue in full force and effect as to inheritances, legacies, donations and gifts made in comtemplation (sic) of death from those persons whose death occurred on and after July 15, 1986 until the aforesaid date of expiration and shall be paid as provided in Section 28A-6 of this Chapter.

ADOPTED BY THE COUNCIL OF THE CITY OF NEW ORLEANS AUG. 7, 1986

JOSEPH I. GIARRUSSO
PRESIDENT OF COUNCIL

Delivered to the Mayor on AUG. 8, 1986

Approved: AUG. 11, 1986

SIDNEY BARTHELEMY
MAYOR

Returned by the Mayor on AUG. 11, 1986 at 10:00 A.M.

EMMA J. WILLIAMS
CLERK OF COUNCIL

THE FOREGOING IS CERTIFIED
TO BE A TRUE AND CORRECT COPY

/s/ Emma J. Williams
CLERK OF COUNCIL

ORDINANCE
CITY OF NEW ORLEANS
CITY HALL: November 19, 1987
CALENDAR NO. 14,420
NO. 12147 MAYOR COUNCIL SERIES
BY: COUNCILMAN BOISSIERE (BY REQUEST)

AN ORDINANCE, to amend and reordain Chapter 28A of Ordinance Number 828 M.C.S., known as the Code of the City of New Orleans; to impose a tax upon all inheritances, legacies, donations and gifts made in contemplation of death; to provide exemptions from said tax; to establish the rates of said tax; to provide for the collection of said tax; and to otherwise provide with respect thereto.

SECTION 1. THE COUNCIL OF THE CITY OF NEW ORLEANS HEREBY ORDAINS, That Chapter 28A of Ordinance Number 828 M.C.S., is hereby amended and reordained to read as follows:

CHAPTER 28A
GIFT AND ESTATE TAX
ARTICLE I. IN GENERAL

Section 28A-1. Levy of Tax

There is hereby levied a tax upon all inheritances, legacies, donations and gifts made in contemplation of death, except as such may be specifically exempted in this Chapter, provided that each such inheritance, legacy, donation and gift result from donation made or inheritance or legacy result from death occuring (sic)

on or after July 15, 1986 until the date of expiration of this Chapter. The levy of the tax shall tax effect at the moment of death.

Section 28A-2. Exemptions

The following shall be exempt from the tax imposed by this Chapter:

(a) Inheritances, legacies, and donations and gifts made in contemplation of death, to a direct descendant by blood or affinity, ascendant, or surviving spouse of a decedent, as follows:

(1) To the amount of twenty thousand dollars if the death occurs during the calendar year 1986.

(2) To the amount of twenty-five thousand dollars if the death occurs during the calendar year 1987 and following years.

(b) Inheritances, legacies, and donations and gifts made in contemplation of death, to a collateral relation of the decedent, (including brothers or sisters by affinity) to the amount or value of one thousand dollars.

(c) Legacies and donations, and gifts made in contemplation of death, to a stranger, to the amount of five hundred dollars.

(d) All legacies and donations to charitable, religious or educational institutions located within the City of New Orleans.

(e) All legacies and donations to the City of New Orleans for exclusively public purposes.

(f) All usufructs to surviving spouses whether testamentary or by operation of law.

Section 28A-3. Rates of Tax.

A. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a direct descendant by blood or affinity, ascendant or surviving spouse of a decedent by blood or affinity, ascendant or surviving spouse of a decendent (sic) shall be computed as follows:

No tax shall be collected or be due on the amount exempt by Section 28A-2(a); the tax shall be two percent of the fair market value thereof at the time of death on the next twenty thousand dollars, and three percent of such fair market value on any amount in excess of the sum of the exemption plus twenty thousand dollars provided that the tax liability of any such direct heir shall not exceed the sum of one hundred thousand dollars.

B. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a collateral relation, including brothers or sisters by affinity, shall be computed as follows:

No tax shall be collected or be due on the first one thousand dollars; the tax shall be five percent of the fair market value thereof at the time of death on the next twenty thousand dollars, and seven percent of such fair market value on

any amount in excess of twenty-one thousand dollars.

C. The tax upon every inheritance, legacy, donation or gift made in contemplation of death, to or in favor of a stranger shall be computed as follows:

No tax shall be collected or due on the first five hundred dollars; the tax shall be five percent of the fair market value thereof at the time of death on the next five thousand dollars, and ten percent of such fair market value on any amount in excess of five thousand five hundred dollars.

D. The aforesaid exemptions shall be applied against the net estate which is determined after the deduction of all debts of the decedent and his estate, said deductions to be the same as those permitted by the State of Louisiana in the collection of its inheritance tax.

Section 28A-4. Property used as measure of tax.

A. Except as provided in Subsection (C) of this Section except as otherwise provided by law and except to the extent of the exemptions provided in Section 28A-2 of this Chapter the tax imposed by this Chapter shall be imposed with respect to all property of every nature and kind included or embraced in any inheritance legacy or donation or gift made in contemplation of death, including all immovable property and all tangible movable property physically in the Parish of Orleans, whether owned or inherited by, or bequeathed, given or donated to a resident (sic)

non-resident, and whether inherited, bequeathed given or donated under the laws of this state or of any other state or country by a person subject to the jurisdiction of the Civil District Court for the Parish of Orleans, State of Louisiana, at the time of death. The tax shall also be imposed with respect to all movable property, tangible or intangible, owned by residents of the parish of Orleans, wherever situated; provided that the tax shall not be imposed upon any transfer of intangible movable property owned by a person not domiciled in this Parish at the time of his death.

B. In the event that any real estate is included in the estate of the decedent and is bona fide mortgaged in an amount in excess of fifty per centum of its value, in computing the equity of value of such estate for the purpose of assessing an inheritance tax, the apparent margin between the appraised value of such realty and the mortgage encumbrance thereon shall be reduced by an amount equal to twenty per centum of such encumbrance.

C. Notwithstanding the provisions of this section or of any provision of law, there shall be excluded from the property subject to the tax imposed in this Chapter any proceeds receivable by any beneficiary, other than the estate of the decedent, under any life insurance policy, or any retirement or pension plan, trust, system or policy. Retirement or pension plan, trust system, or policy, as used in this subsection, means and

includes any contract, agreement or arrangement under which an annuity or other payment was payable to the decedent or which the decedent possessed the right to receive, either alone or in conjunction with another, for his life.

Section 28A-5. Valuation of annuities or usufructs. The Director of the Department of Finance shall adopt and promulgate methods and tables which shall be used as the basis of fixing the valuation of annuities and usufructs or rights or (sic) use or habitation and which methods and tables shall conform to the methods and tables for fixing the evaluation of valuation of annuities and usufructs or rights of use or habitation established in Louisiana Revised Statutes 47:2405 and the American Experience Table of Mortality.

Section 28A-6. Time and Place for Payment of Tax

A. The tax imposed by this Chapter shall become due and owing at the time at which an inheritance tax return is filed with the Collector of Revenue of the State of Louisiana.

B. The Director of the Department of Finance shall publish such forms as he deems necessary and proper for the remittance of the tax and the tax shall be remitted, with such form to the Department of Finance, City of New Orleans.

SECTION 2. Should any provision of this Ordinance be declared to be invalid by a court of competent jurisdiction, such declaration of invalidity shall not affect the other provisions of this ordinance which may

be given effect without the invalid provision, and to this end the provisions of this ordinance are hereby declared to be severable.

SECTION 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

ADOPTED BY THE COUNCIL OF THE CITY OF NEW ORLEANS DEC 10 1987

JOSEPH I. GIARRUSSO
PRESIDENT OF COUNCIL

DELIVERED TO THE MAYOR ON DEC 11 1987

APPROVED: DEC 21 1987

SIDNEY J. BARTHELEMY
MAYOR

RETURNED BY THE MAYOR ON DEC 21 1987
AT 2:35 PM

EMMA J. WILLIAMS
CLERK OF COUNCIL

PETITION 07:BL3

THE FOREGOING IS CERTIFIED
TO BE A TRUE AND CORRECT COPY

/s/ Emma J. Williams
CLERK OF COUNCIL

ORDINANCE
(AS AMENDED)
CITY OF NEW ORLEANS

CITY HALL: SEPTEMBER 21, 1989

CALENDER NO. 15,913

NO. 13494 MAYOR COUNCIL SERIES

BY: COUNCILMAN GIARRUSSO, SINGLETON, BOISSIERE, EARLY, JACKSON, AND TAYLOR

AN ORDINANCE to repeal Chapter 28A of the City Code as enacted by Ordinance Number 12147 M.C.S. which imposes the gift and estate tax (inheritance tax); and otherwise to provide with respect thereto.

SECTION 1. THE COUNCIL OF THE CITY OF NEW ORLEANS HEREBY ORDAINS That Chapter 28A of Ordinance Number 828 M.C.S. be and the same is hereby repealed effective January 1, 1990 except as hereinafter set forth.

SECTION 2. The tax previously levied by Chapter 28A of Ordinance Number 828 M.C.S. upon all inheritances, legacies, donations and gifts made in contemplation of death shall not apply to any deaths occurring on or after December 31, 1989.

SECTION 3. Any tax still due and owed to the City pursuant to the aforementioned ordinance and Chapter of the City Code shall remain due and collectible by the City and to that end the payment provision of that ordinance and Chapter of the City Code shall remain in full force and effect until all taxes due thereunder, together with interest, penalties and attorney's fees, where the same are due, shall have been collected by the City.

ADOPTED BY THE COUNCIL OF THE CITY OF NEW ORLEANS NOVEMBER 2, 1989

JOSEPH I. GIARRUSSO
PRESIDENT OF COUNCIL

Delivered to the Mayor on NOVEMBER 3, 1989

Approved: NOVEMBER 6, 1989

SIDNEY J. BARTHELEMY
MAYOR

Returned by the Mayor on NOVEMBER 6, 1989 at 2:00 PM

EMMA J. WILLIAMS
CLERK OF COUNCIL

YEAS: Boissiere, Early, Giarrusso, Jackson, Singleton, Taylor and Wilson – 7
NAYS: 0
ABSENT: 0

THE FOREGOING IS CERTIFIED
TO BE A TRUE AND CORRECT COPY

/s/ Emma J. Williams
CLERK OF COUNCIL

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION: "H"

NUMBER :87-8242 DOCKET: 1
C/W: 87-9235 AND
NUMEROUS OTHER CASES

SALOME HILDERBRAND

versus

CITY OF NEW ORLEANS, et al

O R D E R

The parties have unequivocably agreed that all matters growing out of the enforcement of certain ordinances designed to impose an inheritance tax by the City of New Orleans, are consolidated in this cause;

This Court held several informal conferences of varying lengths with most, if not all, of the attorneys representing the numerous interests involved in this litigation;

Counsel for all parties agree that this cause is grounded in law and that there are no factual issues to be litigated;

Counsel for the several successions (also referred to herein as "Petitioners"), have joined in submitting a *"Motion For Summary Judgment"*;

Counsel for the City of New Orleans have filed a *"Cross Motion For Summary Judgment"*. The Court recognizes that the questions related to procedural defects, etc. might require consideration of whether there are facts in

dispute. However, this and other concerns are "mooted" by this Court's findings in law and jurisprudence.

For the reasons attached hereto and incorporated herein by reference:

IT IS ORDERED, ADJUDGED AND DECREED that the Motions for Summary Judgment, filed herein by Petitioners, Succession of Salome Hildebrand and all other successions similarly situated, and before this Court, are GRANTED, and the Ordinances – No. 11, 262 M.C.S. adopted on July 15, 1986, NO. 11, 337 M.C.S. adopted on August 7, 1986, and NO. 12, 147 M.C.S. adopted on December 10, 1987, are found by this Court to be violative of the Louisiana Constitution of 1974, illegal under our laws and jurisprudence and unenforceable in several of its applications.

FOR THE SAME OR SIMILAR REASONS, IT IS ORDERED, ADJUDGED AND DECREED that the Cross Motion for Summary Judgment, filed herein by the City of New Orleans, is DENIED.

The Court will issue such other orders as are appropriate in the premises, in all other matters related to or growing out of these consolidated causes.

The 18th day of October 1988.
NEW ORLEANS, LOUISIANA

/s/ REVIUS O. ORTIQUE, JR.
JUDGE

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION: "H"

NUMBER :87-8242 DOCKET: 1
C/W: 87-9235 AND
NUMEROUS OTHER CASES

SALOME HILDERBRAND

versus

CITY OF NEW ORLEANS, et al

REASONS FOR THE RULINGS

These Rules grow out of numerous challenges to the authority of the City of New Orleans (hereinafter referred to simply as "the city" or "the council") to levy an "Inheritance Tax".

A brief statement of the procedural steps taken by the city is appropriate since at least some of the petitioners have attacked the process as being violative of the Home Rule Charter and therefore the statute is ab initio – null and void.

Acting under an alleged broad taxing authority, which the city claims it is afforded by the 1974 Constitution and the powers granted to the city, under an original "Home Rule Amendment" to Act 159 of 1912, and the legislative grant of "Home Rule" pursuant to Article XIV, Section 22 of the 1921 Constitution, as amended by the Home Rule Amendment of 1950, and subsequent reenactment under the current "HOME RULE CHARTER OF THE CITY OF NEW ORLEANS", effective May 1,

1954, the City Council approved the imposition of an inheritance tax by Ordinance No. 11, 262 M.S.C., effective July 15, 1986. The council subsequently amended this initial effort to impose the tax on two (2) occasions to wit: Ordinance No. 11, 337 M.C.S. adopted on August 7, 1986, and Ordinance No. 12, 147 M.C.S. adopted on December 10, 1987. By Councilmanic action, urged by the city to have been appropriate under the "Charter" requirements of advertising delays, etc. but strenuously denounced by Petitioners as having been enacted with reckless disregard for fundamental and critical dictates of charter provisos, thus rendering the resultant third ordinance void . . . .Counsel for the city, citing several authorities, rejected this argument as being without substance and without merit.

For the moment, however, this Court does not find it compelling to consider this aspect of the cause. Neither does this Court find it compelling to address the urgings of Petitioners that the proposed "tax" is not a tax but is in fact a "duty" or "fee" imposed upon the privilege of inheritance or transmission of an estate – thus no governmental subdivision has the power or authority to impose. This posture was inspired by the words of our Louisiana Supreme Court when it faced a challenge by an estate representative to the imposition of the inheritance tax upon "mineral and royalty interests", in view of the constitutional prohibition against "value addition. . . .by reason of the presence of oil, gas, etc." Our Supreme Court declared:

> "It is well recognized by Courts of our sister states that the inheritance tax, strictly speaking, is not a tax at all, but is a premium or bonus

> exacted by the sovereign on the right or privilege of inheritance or transmission of an Estate."

Succession of Barr
250 La. 141 (1966)
194 So. 2d 726, 727

This Court has not only carefully considered the context in which our highest court deemed it appropriate to make such a distinction, but also reviewed the resolution of an attempt at "legal legerdemain" when the argument was made that the imposition was a duty on "exports", in violation of the international line governing commerce. Mr. Chief Justice Taney of the U.S. Supreme Court "disposed of the matter in a few words. . . ."

> the power which every state and sovereignty possesses, of regulating the manner and term upon which property. . . .within its dominion may be transmitted. . . ."

Mager vs. Grima, et al
49 U.S. 490
12 L.Ed. 1168 (1850)

So it matters not what we call it today. For purposes of this litigation, "tax", "duty", "fee", or whatever appellation, it is a distinction, without a difference.

The threshhold question to be considered by this Court is whether the Louisiana Legislature has delegated to the City the power to impose an inheritance tax "either by general statute or charter". This is the classic quote from the opinion of the Supreme Court of Appeal of Virginia. Despite the broad language of the Virginia Code "authorizing a town or city to levy a tax. . . .on any property therein. . . .and under a charter of a town providing that its council may raise taxes annually by

assessment on all subjects taxable by the state. . . ." that Court concluded:

> "It would seem clear from the authorities that the power of a Municipality to attach such burden to the devolution of property can only be conferred by express grant".
>
> Town of Wytheville vs. Johnson's Executor
> 108 Va 589 (1908)
> 62 SE 328 (Va. 1908)

But a single authority does not a decision make!

Any review of the jurisprudence, whether from Louisiana or other jurisdictions or the several learned treatises on the subject, states may confer the power to tax on municipal authorities. They may even grant the power to tax the same property subject to state tax, within its limits, except as prohibited by the Constitution of that state. However, it is equally clear from the same or similar fountainheads of the law, that a charter is an instrument conferring specific powers. And even in apparent blanket grants of home rule authority, exceptions of various origins have been reserved to the states.

> Boh Brothers vs City of New Orleans
> 499 So 2d 385 (1986)
>
> N.O. Firefighters Assoc. vs City of N. O.
> 230 So 2d 326 (1970)
>
> See also: 16 McQuillin Mun. Corp. 44.07
> (3rd. ed., rev. vol. 1984)

In its declarations of *"The Law of Municipal Corporations"*, Third Ed., 1988 Revised Volume, ". . . .the prevalent American political theory is that the state antedates the municipal corporation and hence, the charter is theoretically a delegation of a portion of the state's powers for

local self government." ". . . .owing its existence to the law, the corporation is precisely what the law makes it. It has no powers except those expressly conferred, or which are necessary to the exercise of those expressly given, and to enable it to accomplish the purpose of its creation".

2 McQuillin Mun. Corp. 9.01
(3rd. ed., rev. vol. 1988)

This Court paid careful attention to the oral argument as well as the well prepared Memorandum filed by the City Attorney expressing the notion that the charter grants to the city the power to carry out its mandate – i.e., to effectively govern its people – and in order to do so it must have the untramelled power to tax. This Court heard nothing nor has it been shown any law or jurisprudence to support that bold assertion. Strict constructionists hold the view – expressio unius personae est exclusio alterius – where the legislature has granted one power expressly indicated, it will be inferred that they intended others to be withheld.

1 Antieau, Municipal Corp. Law 85.04
Vol. 1 & 5.04 (1988)

This Court is aware that Counsel for the City may be relying on the more liberal views expressed by some of the cases outside of our jurisdiction in which Courts "have given to Municipal corporations powers not necessarily implied, but reasonably or liberally implied, from granted powers". The Court noted how valiantly counsel urged that the City of New Orleans was suffering almost indescribable financial difficulties. At one point he called the situation *"desperate"*. He reasoned that since the state had mandated that the city "exercise certain police powers for the maintenance of the health and welfare of

the populace", the City had the "implied" power to raise the funds necessary to defray the costs of the mandate. Obviously, the City must have the power to raise funds. It is firmly established that the power to tax "may include the conferring upon municipal corporations and local authorities the power to tax the same property within its limits for local purposes. . . .", *except as prohibited or limited by the Constitution of the State*! But "desperation" is not license nor cogent reason to sail upon constitutionally sacred waters in pursuit of largesse. Our Supreme Court in 1946 was faced with an internecine squabble between the town of Bossier City, (a Municipal Corporation) and the Police Jury of Bossier Parish over road taxes levied on property located within the limits of Bossier City. In that case the town of Bossier City relied on Act #24 of 1870 which provided that taxes collected within the corporation limits would be paid over to the Town of Bossier City. This position was in essence frustrated by ordinance 139 of 1945. However, the Parish countered that the Constitution and Statutes of the State which were in effect at the time "the city" adopted its ordinance had repudiated Act No. 24 of 1970 and that Ordinance 139 of 1945 was repugnant to the prevailing law. The Court, after briefs, oral arguments, hearing and re-hearing, reached the expected, appropriate and legally sound unanimous opinion that the provisions of the Constitution and general statutes of the state take precedent over local ordinances or even state statutes in conflict therewith. In other words, local laws adopted by Municipal legislative bodies must be consistent with state constitutional provisions or the local law must fall.

Consider the rational of:
State ex rel etc. vs Padgett
211 La. 603
30 So 2d 555 (1947)

Morial vs City Council of City of New Orleans
413 So 2d 185 (La. Ct. App. 4th Cir. 1982)
Writ denied, 420 So 2d 170 (La. 1983)
Cert. denied, 459 U.S. 1207 (1983)

Evans vs Berry
186 N.E. 203

During oral argument, the Court suggested to Counsel that our Louisiana Constitution (1974), Article 6, 9 might be compelling when seeking to determine whether the action of the Council could pass constitutional muster. Counsel for the city stated unequivocably that it was not applicable, since in his view this section "referred to police powers", accorded local governments. Perhaps this cavalier approach might be appropriate if the legislative history of that article had not been so carefully preserved. The Court has secured a copy of Vol. 7 – Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts. The following is an excerpt from the third reading and final passage of Section 9.(A):

> "Now, in reading Section 9, you must read it in conjunction with Section 12 which shows that limitations are intended to be placed upon this power. One is that a local governmental subdivision cannot incur a debt payable from ad valorem taxes maturing more than forty years; it cannot define or provide for punishment of a felony, and it cannot enact a private of (sic) civil ordinance governing civil relationships. Now by civil relationships it is intended to mean the

civil code, the trust code, the workman's compensation law and the various laws in our state governing civil relations.

Section 9 also has to be read in conjunction with the limitations placed on local government finance in Sections 31 through 43.

In closing, fellow delegates, I'd like to point out to you that what we're talking about here is the right of the people on the local level to efficiently handle their own affairs. After considering all of the alternatives available to us, the committee felt that this system, this combination of Section 8 and Section 9 together, was the most efficient way to accomplish this. This combines the best of two worlds. It combines the freedom and flexibility of movement necessary in a highly mobile society where we have mass transportation and mass media and everchanging concepts, with the idea of legislative supervision and control or for an overall game plan on the state level."

The above quotation refers to Section 9.(A) but not to 9.(B). How do we know that? Simply because it is recorded that the convention adopted 9.(A) – and then went into an extensive and extended discussion of what police powers were, what police powers were being relinquished or delegated to governmental subdivisions and which were being retained by the state.

In this Court's view, the redactors of our 1974 Constitution wished to make it clear that the State reserved the absolute right to deal with felons on the criminal side, and on the civil side – private or civil relationships – were likewise reserved to the State. Nothing could be clearer! The State has spoken and has made its intention

known. . . .by a supreme pronouncement – the Constitution!.

The Court might leave this matter with the finality of the Constitution except that Counsel for the city postulated what appeared to be a unique theory, during oral argument, which one also might glean in the city's well reasoned and very much appreciated comprehensive brief to the Court. Counsel suggests that "sovereignty" carries with it the power to enact laws requiring the payment of taxes. He then postulates that the state exercises a portion of sovereignty – perhaps the major portion – and it sometimes grants some of its sovereign powers to a Municipality or other governmental sub-division. He further suggests that after the state has exhausted all of its sovereignty there is "some" sovereignty remaining. It is that sovereignty that *the city* is now exercising and therefore *the city* can enact an inheritance tax under that "left-over sovereignty". Such a notion is not new, but still unique in law. Professor Gary T. Schwartz of the UCLA Law School analyses what he calls "this generous interpretation" of home rule but rejects it with this quotation from ". . . .the first and foremost booklength treatise on home rule, Professor H. McBain's "The Law and Practice of Home Rule", published in 1916. . .

> "By common understanding such general subjects as. . . .domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations and many others have never been regarded by anyone, least of all by the cities themselves, as appropriate subjects of local control. No city has been so foolhardy as to venture generally into anyone of these fields of law. It

has simply been universally accepted. that these matters are strictly of state concern!"

Schwartz, G., *The Logic of Home Rule and the Private Law Exception* 20 U.C.L.A., L. Rev. 671, 690 (1973)

This Court cannot ignore the "unilateral" nature of a local inheritance tax and its affect (sic) on the imposition of an inheritance tax at the state level. Our constitutional writers felt the need to compel statewide regulation of certain private activities that individuals engage in. If the imposition of an inheritance tax was permitted to be imposed upon Orleans Parish citizens, the citizens of the other sixty three (63) parishes of this state would enjoy a greater benefit from the statewide regulation of the descent and distribution. In this Court's view, this is the "very nature of the beast". Variation in the treatment of heirs, legatees and/or devisees dilutes the rights of persons who by happenstance are subject to the jurisdiction of the Civil District Court and would tend to erode their right to the equal protection and due process guarantees of both the State and Federal Constitutions. If it were not so, Art. III, § 12 (A) (3) of the La. Constitution of 1974 would be meaningless.

This Court would hasten to add that the qualification "Persons subject to the jurisdiction of the Civil District Court". . . .is likely to stir up a quagmire of litigation not contemplated by the Council of the City of New Orleans. First of all, "subject to the jurisdiction of" is a term of art, not readily defined. If there are those who own property not subject to the jurisdiction of this Court, do they escape the tax? Secondly, a minor who dies, not having had a tutor to qualify on his behalf, may not be subject to

the jurisdiction of the Civil District Court, at the time of his death. For, "jurisdiction" does not confer sovereignty and might diminish the efficacy of any such tax. To be enforceable against a sibling above the age of majority, and not the one below, may violate equal protection. But even more, it poses an impermissible conflict with state law. "Double taxation" is not inherently wrong, but in this instance it is intrinsically contrary to law.

A fundamental tenet of our democracy is that tax codes and the consequences thereof must be administered even handedly and without a discriminatory effect. The ordinance which the City now seeks to enforce is fatally flawed because it states that the tax is due by those who benefit at the moment of death. The exact language of the ordinance requires examination!

> ". . . .The tax imposed by this chapter, . . . shall be imposed with respect to all property . . . whether owned or inherited by, or bequeathed, given or donated to a resident or non-resident and whether inherited, bequeathed, given or donated . . . by a person subject to the jurisdiction of the Civil District Court for the Parish of Orleans, State of Louisiana, at the time of death."

If the ordinance decrees what it appears to decree, it vitiates the Louisiana Civil Code Articles which makes the tax enforceable at the time of receipt of property (La. RCC Art. 946). Under the ordinance, however, the city fathers and mothers impose the tax at the "moment of death". Our Code recognizes that persons may renounce a succession interest (La. RCC Art. 948). Our Code also recognizes that persons, who might otherwise come to a

succession, may be found unworthy and thereby are subject to the codal articles on disinherison (La. RCC Arts. 964 and 1617 et. seq.). Then, there are the all important provisions of our Code pertaining to those who receive donations mortis causa which are subject to collation or reduction (La. RCC Art. 1227, et. seq.). Counsel for the city urged that the council adopted the exact language of the State provisions creating an inheritance tax, except for appropriate language to facilitate application and enforcement. However, the authors of the ordinance failed to take into account that in changing the language, which may appear ever so slight to a lay-person, that change creates myriad entanglements which destroys (sic) the efficacy of the ordinance and renders it unenforceable. Of even greater import, the authors of the ordinance failed to appreciate that the state statute creating and defining an inheritance tax is inextricably entwined in the broad vista of codal provisions, statutes and jurisprudence which affects the laws of descent and distribution. It is difficult, if not impossible, to justly enforce this ordinance without all of these other considerations. The four outlined hereinabove are merely suggestive, not exhaustive.

Counsel for Petitioners describe a situation which demonstrates with unusual clarity the futility of the authors of the ordinance in trying to impose an inheritance tax on "persons subject to the jurisdiction of the Civil District Court for the Parish of Orleans", without a complete understanding and appreciation of the Codal provisions affecting those who take upon the death of such person.

It is needless to recite in detail the facts of the *Succession of Mrs. Ida L. Black Rodgers* – CDC No. 88-4136 – which is one of the many cases challenging this tax. Suffice it to state that Mrs. Ida L. Black Rodgers died leaving a husband and son. However, before any one was actually placed in possession *both* husband and son died.. (sic) Thus two of the persons who would take from the estate of Mrs. Ida Black Rodgers died, *prior* to their being judicially recognized as heirs and/or legatees. As has been previously indicated, the United States Supreme Court has found that inheritance taxes may be imposed by a state upon the *transfer* of property and has held that this is true even if the recipient is a non-national. The authors of the (third) ordinance would impose the tax at the time of death. To levy the tax at the "time of death" results in the improper taxation of the vesting of seizin as contemplated by the state statute. Our Supreme Court has spoken resolutely on this subject in holding that "the tax is imposed on the transfer of the property by the succession representative to the heirs". Thus, where an heir or legatee dies prior to the time of the execution of the judgment of possession, no inheritance tax is due by the forced estate.

Succession of Levy
115 La. 377 (1905)
39 So 37
Succession of Martin
234 La. 566 (1958)
100 So. 2d 509

To require that the estates of Lynn M. Rodgers and William F. Rodgers owe the City of New Orleans an inheritance based on property they *did* not receive is

unreasonable and irrational. This Court would respectfully suggest that based on our cursory research, this result would not be enforceable in any Court – trial or appellate!

Our positive law as well as our jurisprudence is clear on this. The inheritance tax has been decreed, in this state, not to be a tax on the property itself, but "upon the transfer of said property, by will or descent". Such a tax is not enforceable until the right of seizin is merged into seizin-in-fact of the particular property which is subject to the tax. The justification for the tax was enunciated by our highest Court as follows:

> "The tax is levied upon the theory that the heir or legatee should have in point of fact received a benefit from the inheritance which falls to him, out of which benefit to him a portion, (as provided in the taxing law), is made to go to the state. The lawmaker deals with this matter from a practical standpoint, and not from definitions which may be applied in the abstract to the word 'inheritance'. . . ."
>
> Succ. of May
> 120 La. 692
> 45 So. 551, 554 (1908)
>
> This quotation appears in and is cited with approval:
>
> Succ. of Martin
> cited supra

Even if the ordinance passed constitutional muster, the impermissible conflict with state law renders it contra legem terrae!

Finally, this Court is impressed with argument of Counsel by the Petitioners which recite the several instances when the City Ordinance could not be enforced. An oracle of jurisprudence is that the authority to impose a tax must be joined with a concomitant means to enforce the tax. Legal scholars have frequently opined: "The right to levy taxes without the right to enforce payment would be a useless thing." It was with this thought that the Court raised the question with counsel for the City. "How did the City plan to enforce the levy of the tax against residents outside the city limits or of other states?" The response was a simplistic one, i.e., *"in the same manner that any other foreign judgment is enforced"*. But this Court does not find any jurisprudence to support such a response.

Looking again to the "bible" on the power and authority of a municipality under home rule, we find this pronouncement:

> "Unless the legislature is held to have power to delegate this power to tax property outside municipal limits, and in fact has delegated such power, a municipality cannot, as stated, ordinarily tax property unless its situs is within the corporate limits, and hence cannot tax lands outside the territorial limits of the municipality, or levy a direct tax upon subjects of taxation outside the state from which it holds its power."
>
> The law of Municipal Corporations 3rd Ed.
> McQuillin Mun. Corp. § 44.91
> Cited supra

Legal scholars have likewise opined about the difficulty in enforcing tax against non-residents as must be contemplated by the ordinance now being challenged.

Very early in the development of Louisiana jurisprudence were pronouncements by our Supreme Court regarding the collection of taxes on property outside the City of New Orleans. The Court held that "The Corporation had not the right of imposing *any kind of tax* on property of *any nature* outside of the incorporated parts of the City." Thus this Court believes that it will be at least much more difficult to enforce any inheritance tax against property not within the confines of the City, than the mere mechanics of enforcing a foreign judgment.

See: Lafferranderie vs The Mayor of N.O.
3 La. 246 (1832)

A cursory survey of jurisprudence in other states appears to support that very early decision and our view. Courts rationalize much more diffusely when faced with extra-territorial enforcement of locally imposed taxes. On this point, a sister-state pronouncement is illustrative of universally accepted legal principle:

> "Generally speaking, inheritance tax laws have no extra territorial force. Statutes imposing an inheritance tax can be enforced only on subjects which are within the jurisdiction of the state and the Courts of one state will not compel the collection of inheritance taxes due under the laws of another state.".

Based on the above quotation from the California Tax Code, a Missouri Court concluded that an effort by the State of California to enforce its statute in Missouri, was

"not transitory" and that the California legislature never created in its inheritance tax law a right separate from a local remedy. Many states apply this litmus test in order to determine whether extra-territorial enforcement is proper.

State of Calif. vs St. Louis Union Trust Co.
260 S W 2d 821 (Mo. Ct. App. 1953)

In matters of extra-territorial enforcement, states have frequently engaged in intellectual gyrations to tap dance around the issue. Our research reveals that whether the debt growing out of the imposition of the tax is sought to be enforced by sovereign state *or* a subdivision of a state, may be determinative of whether the debt *is* enforceable extra-territorially.

See for example the rationale of:
Buckley vs. Huston
279 A 2d 882
(N.J. Sup. Ct. App. Div. – 1971)

A cursory reading of the New Jersey opinion supports the conclusion that: if the "forum state" construes its tax as a state tax it would permit suits in New Jersey to recover taxes due a sister-state. There is a fundamental rationale for this posture. As has been indicated previously there is persuasive history that imposition of taxes must be based on "sovereignty". The fundamental tenet continues to be that only sovereign states can impose inheritance taxes. Query: Would a municipally imposed inheritance tax be enforceable under the "sovereign test" enunciated in the Mager case.

Mager vs Grima (U.S. Sup. Ct. – 1850) cited supra

Another analysis deserves mentioning in this regard. Unlike Louisiana, many states still cling to the "jurisdictional distinctions" of whether an action is "in personam" or "in rem". If the imposition of the tax is perceived to be "in personam", it is not enforceable extra territorially. If it is "in rem" – maybe?

Obviously, this Court has not reviewed rulings in all the forty nine other states. But this Court can state unequivocably that the problem of enforcement may not be taken lightly and within the confines of this ordinance, some debtors would definitely escape liability based not on Louisiana law, but on law foreign to the forum in which there is jurisdiction. This is a legal thicket that could well require years from which to emerge. . . .For this Court concludes that the city has sought relief without carefully weighing or appreciating the legal consequences!

This Court realizes that Petitioners and Respondents have placed considerable time and effort in decrying the lack of procedural observance in the passage of the ordinances and equally of the lack of significance of these deficiencies. This Court was also concerned that there was and is a retroactive pursuit of taxes in violation of general condemnation of such action in numerous jurisdictions. Moreover, this Court appreciates the legal entanglements which would be likely to emerge when questions of jurisdiction are given more than a specious examination in the crucible of constitutional and procedural dissection.

Since this Court finds that the ordinance imposing an inheritance tax is in direct violation of the 1974 Constitution of the State of Louisiana, and is thereby illegal and also unenforceable, all other issues are moot.

RULINGS CONSISTENT WITH THE FOREGOING REASONS WILL BE ISSUED FORTHWITH.

This 18th day of October

NEW ORLEANS, LOUISIANA

/s/ REVIUS O. ORTIQUE, JR.
JUDGE

LOUISIANA
CIVIL CODE
1989

As Revised and Amended through the
1988 Regular and First and Second
Extraordinary Sessions of the Legislature

Art. 9. Clear and unambiguous law

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

Art. 10. Language susceptible of different meanings

When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.

Art. 11. Meaning of words

The words of a law must be given their generally prevailing meaning.

Words of art and technical terms must be given their technical meaning when the law involves a technical matter.

Art. 12. Ambiguous words

When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Art. 13. Laws on the same subject matter

Laws on the same subject matter must be interpreted in reference to each other.

Art. 902. Rights of the state

In default of blood, adopted relations, or a spouse not judicially separated, the estate of the deceased belongs to the state.

Art. 934. Opening of succession on death or presumption of death

The succession, either testamentary or legal, or irregular,* becomes open by death or by presumption of death caused by long absence, in the cases established by law.

*"Or irregular" has no counterpart in French text.

Art. 940. Seizin of heirs, intestate and testamentary

A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

Art. 941. Seizin by operation of law

The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

Thus children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they be merely seized of right and not in fact.

Art. 942. Seizin; continuity of legal possession

The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession.

Art. 943. Seizin; nature and extent of heir's possession

The right of possession, which the deceased had, being continued in the person of his heir, it results that this possession is transmitted to the heir with all its defects, as well as all its advantages, the change in the proprietor producing no alteration in the nature of the possession.

Thus the extent of the rights of the deceased regulates those of the heir, who succeeds to all his rights which can be transmitted, that is, to all those which are not, like usufruct, attached to the person of the deceased.

Art. 944. Seizin; transmission of succession rights to heirs of heir

The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

Art. 945. Seizin; actions by heir

The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in every thing, represents the deceased, and is of full right in his place as well for his rights as his obligations.

Art. 946. Seizin; effect of acceptance or rejection of succession

Though the succession be acquired by the heir from the moment of the death of the deceased, his right is in suspense, until he decide (sic) whether he accepts or rejects it.

If the heir accept, he is considered as having succeeded to the deceased from the moment of his death; if he rejects it, he is considered as never having received it.

Art. 954. Capacity of unborn child or child legitimated by marriage after conception

The child in its mother's womb is considered as born for all purposes of its own interest; it takes all successions opened in its favor since its conception, provided it be capable of succeeding at the moment of its birth.

And the child legitimated by a marriage posterior to its conception only takes those successions which are opened since the marriage of the father and mother.

Art. 955. Necessity for live birth of child in utero at opening of succession

Nevertheless, if the child conceived is reputed born, it is only in the hope of its birth; it is necessary then that the child be born alive, for it can not be said those who are born dead have ever inherited.

Art. 956. Mode of birth and length of life immaterial

When the child is born alive, though it may have been extracted by force from its mother's womb, and may have lived but an instant, provided the fact of its living be ascertained, it inherits the successions opened in its favor since its conception, and transmits them accordingly.

Art. 957. Proof of conception and live birth

There are two things to be proved in order to vest the child with the right of inheriting; one that the child be

conceived at the moment of the opening of the succession; the other, that the child be born alive.

Art. 958. Determination of time of conception

In order to ascertain if the child has been conceived in marriage, and can inherit from the husband deceased after its conception, reference must be had to the rules concerning the filiation of legitimate children established in the title: *Of Father and Child.*

Art. 959. Husband's right to succession of wife's child whose legitimacy incontestable

In all cases in which the husband can not, by law contest the legitimacy of the child, born before the hundred and eightieth day of marriage, he will have a right to the succession of this child and to those successions which fall to this child, in the same manner as if the child had been regularly legitimated.

Art. 960. Remarriage of widow; rights of posthumous child to succession of first husband

If the mother marry again within two months after the death of her husband, and a child is born five months after the second marriage, if the child be born capable of living, it is considered the issue of the first marriage, and is admitted to the succession of the first husband.

Art. 961. Calculation of time required for live birth

In the calculation of the number of months necessary for a child to be considered as born capable of living, thirty days are counted for each month, and the day begun is counted for a whole day, because it is for the interest of the child.

Art. 962. Burden of proof of conception and live birth

Though in general it is incumbent on those who allege incapacity to inherit to prove it, nevertheless, those who claim rights under the child, on account of its having survived, are bound to prove that it was conceived at the time the succession was opened, and that it came into the world alive.

Art. 963. Tests of live birth

With regard to the proofs necessary to establish the existence of the child at the moment of its birth, it must not be determined that it was born alive by the simple palpitations of its members, but by its respirations,* or by other signs which demonstrate its existence.

*English translation of French text incomplete; should include "or by its cries."

Art. 978. Opening of succession necessary for acceptance.

To be able to accept a succession, it is necessary that the succession should be open by the death of the person who is to be succeeded.

If therefore, on the false report of the death of a person, his relation who is to inherit from him, assumes the quality of his heir, and is put into possession of his effects, these acts do not render his relation his heir, even after his death, unless since his death, his relation has continued to act as his heir.

Art. 1626. Rights of particular legatee, demand for delivery

Every legacy under a particular title gives to the legatee, from the day of the testator's death, a right to the thing bequeathed, which right may be transmitted to his heirs or assigns; and this takes place as well in testamentary dispositions, universal or under a universal title, as in those made under a particular title.

Nevertheless, the particular legatee can take possession of the thing bequeathed, or claim the proceeds or interest thereof, only from the day the demand of delivery was formed, according to the order hereinbefore established,* or from the day on which that delivery was voluntarily granted to him.

*"According to the order hereinbefore established" has no counterpart in French text.

Art. 2454. Sale of succession of living person.

The succession of a living person can not be sold.

LOUISIANA
CODE OF CIVIL PROCEDURE
1989

Art. 2951. No judgment of possession or delivery of possession or legacy or inheritance until return and inventory or list filed and inheritance taxes paid; exception

No judgment of possession shall be rendered, no inheritance or legacy shall be delivered, and no succession representative shall be discharged unless satisfactory proof has been submitted to the court that an inheritance tax return, where required, a copy of the petition for possession, the formal inventory or the sworn descriptive list, the affidavit of death and heirship, a copy of the federal estate tax return, when required, and copy of will, if any, have been duly filed with the collector of revenue and that no inheritance taxes are due by the heirs and legatees, or that all taxes shown by the return to be due have been paid, except as otherwise provided herein.

In special cases, when the judge is satisfied that inheritance taxes have been paid on a legacy or on a part of an inheritance and the court is satisfied that inheritance taxes on the remaining legacy, legacies or inheritance to be received by the heir or legatee will be paid, the court may in its discretion, enter an order permitting special legacies to be delivered or possession of a part of an inheritance or legacy delivered or paid, and they may be paid or the possession thereof delivered under such order without liability on the part of the judge. The rate of payment of the inheritance tax on the legacy or inheritance delivered in this manner shall be at the highest rate

of taxation applicable to such heir or legatee. Upon closing of the succession, the heir or legatee may apply for a credit on inheritance taxes due in the event the tax initially paid on the legacy or other inheritance delivered exceeds the tax computed on said legacy or inheritance in accordance with the rate of taxation upon final settlement of the estate.

Art. 3001. Unconditional acceptance

The heirs of an intestate shall be recognized by the court, and sent into possession of his property without an administration of the succession, on their ex parte petition, when all of the heirs are competent and accept the succession unconditionally, and the succession is relatively free of debt. A succession shall be deemed relatively free of debt when its only debts are succession charges, mortgages not in arrears, and debts which are small in comparison with the assets of the succession.

The surviving spouse in community of an intestate shall be recognized by the court on ex parte petition as entitled to the possession of an undivided half of the community, and of the other undivided half to the extent that he has the usufruct thereof, without an administration of the succession, when the succession is relatively free of debt, as provided above.

Art. 3002. Same; petition for possession

The petition of the heirs for possession under Article 3001 shall include allegations as to: the competency of the petitioners; the date of death of the deceased, and all

other facts on which the jurisdiction of the court is based; the facts showing that petitioners are the sole heirs of the deceased; and that the succession is relatively free of debt, as provided in Article 3001.

The petition of the surviving spouse in community for possession under Article 3001 shall include all of the above allegations except those relating to heirship; shall allege the facts showing that he is the surviving spouse in community; shall state what property belonged to the community; and if he claims the usufruct of any interest in the community property, shall allege the fact showing that he is entitled thereto.

The allegations of the petition for possession shall be verified by the affidavit of at least one of the petitioners.

Art. 3003. Same; evidence of allegations of petition for possession

Evidence of the allegations of the petition for possession, under Articles 3002 or 3005, as to the death of the deceased, jurisdiction of the court, marriage of the spouses, and relationship of the petitioners to the deceased, shall be submitted to the court as provided by Articles 2821 through 2823.

Art. 3004. Discretionary power to send heirs and surviving spouse into possession

The heirs of an intestate may be recognized by the court, and sent into possession of his property without an

administration of his succession when none of the creditors of the succession has demanded its administration, on the ex parte petition of:

(1) Those of the heirs who are competent, if all of these accept the succession unconditionally;

(2) The legal representative of the incompetent heirs, if all of the heirs are incompetent and a legal representative has been appointed therefor; or

(3) The surviving spouse in community of the deceased, if all of the heirs are incompetent and no legal representative has been appointed for some or all of them.

In such cases, the surviving spouse in community of the deceased may be recognized by the court as entitled to the possession of the community property, as provided in Article 3001.

Art. 3005. Same; petition for possession; evidence

The petition of the heirs for possession under Article 3004 shall include allegations as to: the competency of the petitioners; the date of death of the intestate, and all other facts on which the jurisdiction of the court is based; and the facts showing that petitioners and the incompetent heirs named in the petition, if any, are the sole heirs of the intestate.

The petition of the surviving spouse in community for possession under Article 3004 shall include all of the pertinent allegations of Article 3002.

The allegation of the petition for possession shall be verified by the affidavit of at least one of the petitioners.

The allegations of the petition for possession shall be proved as provided in Article 3003.

Art. 3006. Same; when one of competent heirs cannot join in petition for possession

If a competent heir of an intestate resides out of the state and cannot be located, or his whereabouts are unknown, the other competent heirs may be sent into possession of the property without an administration of the succession, as provided herein and in Articles 3004 and 3005.

Upon the filing of the petition for possession, the court shall appoint an attorney at law to represent the absent heir, and shall order him to show cause why the heirs of the intestate should not be recognized, and sent into possession of the property of the intestate without an administration of the succession.

After a hearing on the rule against the attorney for the absentee, if the court concludes that the succession is thoroughly solvent and that there is no necessity for an administration, it may send all the heirs of the intestate, including the absentee, into possession.

Art. 3211. Duty to take possession; enforcement of claims and obligations

A succession representative shall be deemed to have possession of all property of the succession and shall enforce all obligations in its favor.

Art. 3421. Small successions defined

A small succession, within the meaning of this Title, is the succession of a person who dies leaving property in Louisiana having a gross value of fifty thousand dollars or less.

Art. 3422. Court costs.

In judicial proceedings under this Title, the following schedule of costs, commissions, and fees shall prevail:

(1) Court costs shall be one-half the court costs in similar proceedings in larger successions, but the minimum costs in any case shall be five dollars; and

(2) The commission of the succession representative shall be not more than five percent of the gross assets of the succession.

Art. 3431. Small successions; judicial opening unnecessary

It shall not be necessary to open judicially the small succession of a person who dies intestate leaving no immovable property, and whose sole heirs are his descendants, ascendants, brothers or sisters, or both, or surviving spouse.

Art. 3432. Submission of affidavit to inheritance tax collector

When it is not necessary under the provisions of Article 3431 to open judicially a small succession, the

competent major heirs of the deceased, and the surviving spouse thereof, if any, may submit to the inheritance tax collector one or more multiple originals of their affidavit setting forth:

(1) The date of death of the deceased, and his domicile at the time thereof;

(2) The fact that the deceased died intestate and left no immovable property;

(3) The marital status of the deceased, and the names and addresses of the surviving spouse, if any, and of the heirs and their relationship to the deceased; and

(4) A brief description of the movable property left by the deceased, and a showing of the value of each item thereof, and the aggregate value of all such property, at the time of the death of the deceased.

Art. 3433. Endorsement that no inheritance taxes due

If the inheritance tax collector is satisfied from the affidavit submitted to him that no inheritance taxes are due, he shall so certify by endorsement on the multiple originals of the affidavit provided by and to be returned to the heirs and surviving spouse, if any.

Art. 3434. Endorsed copy of affidavit authority for delivery of property

A multiple original of the affidavit required by Article 3432, bearing the endorsement of the inheritance tax collector that no inheritance taxes are due, shall be full and sufficient authority for the payment or delivery of

any money or property of the deceased described in the affidavit by any bank, trust company, warehouseman, or other depositary, or by any person having such property in his possession or under his control. Similarly, a multiple original of this affidavit endorsed as required above shall be full and sufficient authority for the transfer to the heirs of the deceased, and surviving spouse, if any, or to their assigns, of any stock or registered bonds in the name of the deceased and described in the affidavit, by any domestic or foreign corporation.

The receipt of the persons named in the affidavit as heirs of the deceased, or surviving spouse thereof, constitutes a full release and discharge for the payment of money or delivery of property made under the provisions of this article. The inheritance tax collector, and any creditor, heir, succession representative, or other person whatsoever shall have no right or cause of action against the person paying the money, or delivering the property, or transferring the stock or bonds, under the provisions of this article, on account of such payment, delivery, or transfer.

WEST'S LOUISIANA STATUTES ANNOTATED

REVISED STATUTES

TITLE 1

GENERAL PROVISIONS

§ 4. Unambiguous wording not to be disregarded

When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit.

TITLE 47
REVENUE AND TAXATION

SUB-TITLE IV. MISCELLANEOUS TAXES

CHAPTER 1. INHERITANCE AND ESTATE TAXES

PART I. INHERITANCE TAX

Sec.

2401. Levy of tax.

2402. Exemptions.

2403. Rates of tax.

2404. Property used as measure of tax.

2405. Valuation of annuity or usufruct and property subject thereto.

2406. Burden of proof of exemptions; certain transfers within one year prior to death presumed in contemplation of death.

2407. Proceedings instituted by executor or administrator.

2408. Proceedings instituted by heir or legatee.

2409. Proceedings instituted by tax collector.

2410. Optional procedure for small estates.

2411. Inheritance or legacy deemed indivisible; heir or legatee incapable of alienating any part until tax is paid.

2412. Payment of tax by transferee.

2413. Certain acts prohibited prior to payment of tax.

2414. Creditors' rights preserved.

2415. Representation of nonresident and unknown heirs and legatees.

2416. Proceedings within jurisdiction of district courts.

2417. Tax collector designated; commission on collections.

2418. Disposition of collections.

2419. Attorneys to assist the tax collectors; attorneys' fees.

2420. Interest on delinquent tax.

2421. Costs of proceedings.

2422. Prescription on actions for inheritance taxes.

2423. Court may award state reasonable expert witness' fee in contested proceeding to determine tax due; tax collector may pay expert witness' fee allowed.

2424. Application of provisions.

2425. Inheritance tax return.

PART II. ESTATE TRANSFER TAX

2431. Levy of tax.

2432. Determination of amount of tax.

2433. Proceedings to fix and collect the tax.

2434. Intent and purpose of this Part.

2435. Application of provisions.

2436. Estate transfer tax return.

PART III. REFUNDS

2451. Claims and suits for refund.

PART I. INHERITANCE TAX

§ 2401. Levy of tax

There is hereby levied a tax upon all inheritances, legacies and donations and gifts made in contemplation of death, except such as are hereinafter specifically exempted.

§ 2402. Exemptions

The following shall be exempt from the tax imposed in this Part:

(1) Inheritances, legacies, and donations and gifts made in contemplation of death, to a direct descendant by blood or affinity, or ascendant, or surviving spouse of a decedent, as follows:

(a) To the amount or value of ten thousand dollars if the time of death occurs during calendar year 1984.

(b) To the amount or value of fifteen thousand dollars if the time of death occurs during the calendar year 1985.

(c) To the amount or value of twenty thousand dollars if the time of death occurs during the calendar year 1986.

(d) To the amount or value of twenty-five thousand dollars if the time of death occurs during the calendar year 1987 or thereafter.

(e) To the total amount or value of the inheritance, legacy, donation or gift made in contemplation of death to a surviving spouse of a decedent if the time of death occurs during calendar year 1992 or thereafter.

(2) Inheritances, legacies and donations and gifts made in contemplation of death to a collateral relation of decedent, (including brothers or sisters by affinity) to the amount or value of one thousand dollars.

(3) Legacies and donations, and gifts made in contemplation of death, to a stranger, to the amount or value of five hundred dollars.

(4) All legacies and donations to charitable, religious or educational institutions located within the State of Louisiana.

(5) All legacies and donations to the State of Louisiana or to any incorporated municipality or other political subdivision thereof, for exclusively public purposes.

Added by Acts 1972, No. 543, § 1.

(6) Donations and legacies to charitable, religious, or educational institutions which are located in another state or territory of the United States, to the extent that the laws of the state or territory wherein such institutions are located contain reciprocal provisions allowing similar exemptions in respect to donations and legacies made to charitable, religious, or educational institutions located in other states or territories of the United States.

§ 2403. Rates of tax

A. The tax upon every inheritance, legacy, donation, or gift made in contemplation of death, to or in favor of a direct descendant by blood or affinity, ascendant, or surviving spouse of a decedent shall be computed as follows: no tax shall be collected or be due on the amount exempt by R.S. 2402(1); the tax shall be two percent of the fair market value thereof at the time of death on the next twenty thousand dollars, and three percent of such fair market value on any amount in excess of the sum of the exemption plus twenty thousand dollars.

B. The tax upon every inheritance, legacy, donation, or gift made in contemplation of death, to a collateral relation, including brothers or sisters by affinity, shall be computed as follows:

No tax shall be collected or be due on the first one thousand dollars; the tax shall be five percent of the fair

market value thereof at the time of death on the next twenty thousand dollars, and seven percent of such fair market value on any amount in excess of twenty-one-thousand dollars.

C. The tax upon every legacy or donation or gift made in contemplation of death to stranger shall be computed as follows:

No tax shall be collected or be due on the first five hundred dollars; the tax shall be five percent of the fair market value thereof at the time of death on the next five thousand dollars, and ten percent of such fair market value on any amount in excess of five thousand five hundred dollars.

D. When an inheritance tax return is filed, the taxpayer may elect an alternate valuation date up to six months from the date of death as the date on which values shall be appraised for purposes of computing the inheritance tax. However, after the election of the valuation date is made, it cannot be revoked.

§2404. Property used as measure of tax

A. Except as provided in Subsection (C) of this section and except to the extent of the exemptions provided in R.S. 47:2402 the tax shall be imposed with respect to all property of every nature and kind included or embraced in any inheritance legacy or donation or gift made in contemplation of death, including all immovable property and all tangible movable property physically in the State of Louisiana, whether owned or inherited by, or

bequeathed, given or donated to a resident or nonresident, and whether inherited, bequeathed, given or donated under the laws or this state or of any other state or country. The tax shall also be imposed with respect to all movable property, tangible or intangible, owned by residents of the State of Louisiana, wherever situated; provided that the tax shall not be imposed upon any transfer of intangible movable property owned by a person not domiciled in this state in this state at the time of his death.

B. In the event that any real estate is included in the estate of the decedent and is bona fide mortgaged in an amount in excess of fifty per centum of its value, in computing the equity of value of such estate for the purposes of assessing an inheritance tax, the apparent margin between the appraised value of such realty and the mortgage incumbrance thereon shall be reduced by an amount equal to twenty per centum of such encumbrance.

C. Notwithstanding the provisions of this section or of any provision of law, there shall be excluded from the property subject to the tax imposed in this part any proceeds receivable by any beneficiary, other than the estate of the decedent, under any life insurance policy, or any retirement or pension plan, trust, system or policy. Retirement or pension plan, trust, system or policy, as used in this subsection, means and includes any contract, agreement or arrangement under which an annuity or other payment was payable to the decedent or which the decedent possessed the right to receive, either alone or in conjunction with another, for his life.

§ 2405. Valuation of annuity or usufruct and property subject thereto

In fixing the value of any legacy or donation mortis causa which consists in whole or in part of an annuity or usufruct or right of use or habitation, the court shall consider the expectancy of life of the legatee or donee according to the table known as the American Experience Table of Mortality, at six per centum per annum compound interest. The following table shall be used as the basis of fixing such values:

AGES	LIFE EXPECTANCY IN YEARS	PRESENT VALUE OF NAKED OWNERSHIP OF $1.00	PRESENT VALUE OF LIFE USUFRUCT OF $1.00
20	42.20	$ .085548	$ .914452
21	41.53	.089967	.910033
22	40.85	.092544	.907456
23	40.10	.096672	.903328
24	39.49	.100197	.899803
25	38.81	.104231	.895769
26	38.12	.108497	.891503
27	37.43	.112975	.887025
28	36.73	.117669	.882331
29	36.03	.122533	.877467
30	35.33	.127675	.872325
31	34.63	.132994	.867006
32	33.93	.138491	.861509
33	33.21	.144448	.855552
34	32.50	.150571	.849429
35	31.78	.157003	.842997
36	31.07	.163604	.836396
37	30.35	.170662	.829339
38	29.62	.178080	.821920
39	28.90	.185664	.814336

AGES	LIFE EXPECTANCY IN YEARS	PRESENT VALUE OF NAKED OWNERSHIP OF $1.00	PRESENT VALUE OF LIFE USUFRUCT OF $1.00
40	28.18	.193637	.806363
41	27.45	.202086	.797914
42	26.22	.217073	.782927
43	26.00	.219810	.780190
44	25.27	.229438	.770562
45	24.54	.239430	.760570
46	23.81	.249794	.750206
47	23.08	.260612	.739388
48	22.36	.271850	.728150
49	21.63	.283666	.716334
50	20.91	.295743	.704257
51	20.20	.308275	.691725
52	19.49	.321346	.678654
53	18.79	.334678	.665322
54	18.09	.348559	.651441
55	17.40	.362956	.637044
56	16.73	.377380	.622620
57	16.05	.392532	.607468
58	15.39	.408054	.591946
59	14.74	.423774	.576226
60	14.10	.439797	.560203
61	13.47	.456366	.543634
62	12.86	.472777	.527223
63	12.26	.489655	.510345
64	11.67	.506809	.493191
65	11.10	.523806	.476194
66	10.54	.541327	.458673
67	10.00	.558395	.441605
68	9.47	.576152	.423848
69	8.97	.592963	.407037
70	8.48	.610365	.389635
71	8.00	.627412	.372588
72	7.55	.644352	.355648
73	7.11	.660916	.339084
74	6.68	.677826	.322174
75	6.27	.694187	.305813
76	5.88	.710037	.289963

AGES	LIFE EXPECTANCY IN YEARS	PRESENT VALUE OF NAKED OWNERSHIP OF $1.00	PRESENT VALUE OF LIFE USUFRUCT OF $1.00
77	5.49	.726532	.273468
78	5.11	.742605	.257395
79	4.74	.758915	.241085
80	4.39	.774608	.225392
81	4.05	.789852	.210148
82	3.71	.805876	.194124
83	3.39	.821084	.178916
84	3.08	.835817	.164183
85	2.77	.851206	.148794
86	2.47	.866319	.133681
87	2.18	.880928	.119072
88	1.91	.894442	.105558
89	1.66	.908152	.091848
90	1.42	.920968	.079032
91	1.19	.933250	.066750
92	.98	.944528	.055472
93	.80	.954717	.045283
94	.64	.963773	.036227
95	.50	.971698	.028302

The value of said usufruct or right of use or habitation, determined as herein provided, shall be deducted from the value of the property on which it rests, in arriving at the value of the said property for the purpose of fixing the inheritance tax due by the person or persons inheriting the same.

§ 2406. Burden of proof of exemptions; certain transfers within one year prior to death presumed in contemplation of death

The burden of proving facts establishing exemptions from the tax imposed by this Part is upon the person claiming the exemption.

All donations or transfers of property for inadequate consideration within one year prior to the death of the owner thereof shall be separately listed in the inventory or sworn statement of the property composing the estate of the decedent, and shall be presumed to have been made in contemplation of death and in avoidance of the tax herein levied, and unless this presumption is overcome by sufficient evidence, the property shall be deemed a part of the succession of the person who has so donated or alienated the property for purposes of computing the inheritance tax due by the succession, legatees or heirs of the person.

Donations and transfers prior to one year of death may be always inquired into and if show to have been made in contemplation of death and in avoidance of taxes, then the same shall be likewise liable to the tax.

§ 2407. Proceedings instituted by executor or administrator

A. **Rule to fix amount of tax.** The executor of the will of a person deceased, or the administrator of his succession, shall, except as hereafter provided in R.S. 47:2410, after payment of his debts, proceed against the tax collector and all the heirs and legatees of the deceased summarily, by rule before the court which has jurisdiction of the succession, to fix the amount of tax due by each heir or legatee, and on trial thereof the court shall render judgment for the same against each heir or legatee, with interest and costs, as hereinafter provided.

B. **Payment of tax.** The executor or administrator shall thereupon pay the tax collector the amount of tax,

with interest and costs, so fixed, on each inheritance, legacy or donation, out of the funds comprised therein, if sufficient. If there are not sufficient funds, the court shall, on the application of the heir or legatee, grant an order for the sale of the property composing the inheritance, legacy or donation, or so much thereof as may be necessary, for the purpose of paying the judgment. If the same is not paid by the heir or legatee, or an order of sale is not granted, as above provided within thirty days after the date of the judgment, the court shall, on the application, of the executor or administrator, grant an order of sale for the purpose, as above provided, and the executor or administrator shall pay the said judgment out of the proceeds of the sale. The sale shall be made in such manner, and on such terms and conditions as the court shall prescribe, and the expense thereof shall be borne by the heir or legatee.

C. **Delivery of inheritance or legacy prohibited until return is filed and tax shown to be due is paid.** No succession representative shall deliver any inheritance or legacy until the tax on such inheritance or legacy shown on the return to be due has been paid and an inheritance tax return, with the accompanying documents required by Code of Civil Procedure Articles 2951, 2952, and 2953 has filed with the collector of revenue as herein provided; otherwise, he, together with his surety, shall be personally liable for the tax, with interest and cost. No succession representative shall be discharged until it is shown that all taxes under this Part which are due by the heirs and legatees have been paid or until it is judicially determined by the process herein provided that no tax is due.

The succession representative may make written application to the collector of revenue or his representative for determination of the amount of tax and discharge from personal liability therefor. The collector or his representative shall notify the succession representative of the amount of the tax as soon as possible, and in any event no later than one year after such application is made or, if the application is made before the return is filed, then within one year after the return is filed, but not after the expiration of the period prescribed for the assessment for the tax. The succession representative, on payment of the amount due pursuant to notification from the collector, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a closing letter from the collector or his representative showing such discharge.

However, prior to the signing of the judgment of possession a bank or any other depository may release funds to a succession representative by certified check or cashier's check payable to the Louisiana Department of Revenue for an amount not to exceed the inheritance tax shown to be due on the return.

§ 2408. Proceedings instituted by heir or legatee

A. Procedure to fix the amount of tax. In all cases in which an administration is not ordered by the court, the legal or instituted heir or universal or residuary legatee, or any other interested person, except as provided in R.S. 47:2410, shall within nine months after the death of the decedent, or should there be a will, within the same time after the discovery of the same, present to

the court a detailed descriptive list, sworn to and subscribed by him of all items of property contained in and composing the succession of the decedent, and stating the actual cash value of each item at the time of the death of the decedent. This list shall be served on the tax collector who shall have the right to traverse the same, and a copy of the list together with an inheritance tax return shall be filed with the collector of revenue. If the deceased has made special or particular legacies or donations mortis causa, the legatee shall also be served, and after summarily hearing the parties, the court shall fix the amount of tax due by each heir or legatee, and shall render judgment therefor with interest and costs, against each of them.

The various judges of the district courts of the state of Louisiana are authorized to sign rules against the Inheritance Tax Collector or his authorized representatives directing them to show cause at such time, but not less than forty-five days from the date rule is signed why the inheritance tax, if any, should not be fixed by the court as prayed for, and why the heirs and other beneficiaries should not be sent into possession of property upon the payment of the inheritance tax as fixed, or without the payment of inheritance taxes where none is due, as the case may be. In cases where these rules are not contested, the judge is authorized to pass upon them and sign judgments thereon in open court or in chambers, in term time or in vacation, and either within or without his district.

B. **Payment of tax.** In the same manner as provided in R.S. 47:2407B, the heir or universal or residuary legatee shall thereupon pay or take measures for the payment of

the tax due on all special or particular legacies or donations. The heir or universal or residuary legatee may likewise obtain an order for the sale of the property of his inheritance or legacy, or part thereof, for the purpose of paying the tax thereon. But if the tax is not paid, or the order of sale is not made within thirty days after the date of the judgment fixing the amount of the tax, a similar order for the same purpose shall be granted on the application of the tax collector, and thereunder any property forming part of the inheritance or legacy may be sold, and the proceeds thereof shall be applied to the payment of the tax with interest and costs.

C. **Delivery of legacies prohibited until return is filed and tax shown to be due is paid.** No heir or residuary or universal legatee shall deliver any legacy until the tax on such legacy shown on the return to be due has been paid and an inheritance tax return, together with the accompanying documents required by Code of Civil Procedure Articles 2951, 2952 and 2953, has been filed with the collector of revenue. Otherwise, he shall be personally liable for the tax, with interest and costs.

However, prior to the signing of the judgment of possession, a bank or other depository may release funds to an heir or legatee by certified check or cashier's check payable to the Louisiana Department of Revenue for an amount not to exceed the inheritance tax shown to be due on the return.

D. **Proceedings where there are more than one heir or legatee.** If there is more than one legal or instituted heir or universal or residuary legatee any one of them may institute the proceedings provided by this Section,

and the others shall be made parties thereto, and such heir shall be entitled to recover out of the mass of the succession, one reasonable attorney's fee, besides his costs.

§ 2409. Proceedings instituted by tax collector

A. **Application for order directing search for will.** If during the six months next following the death of any person leaving movable or immovable property within this state, an administration or his succession is not applied for, or his legal or instituted heir or universal or residuary legatee do not apply to the court to be placed in possession thereof, the court shall ex parte and on the application of the tax collector grant an order directing a notary public to make a search for the will of the deceased; he shall also order all persons having in their possession or control any books, papers or documents of the deceased or any bank box safe deposit vault or other receptacle likely or designed to contain the same, to open such receptacle and exhibit the contents thereof, as well as all other books, papers, and documents of the deceased, to the notary.

B. **Procedure if will is found**. If the notary finds any document appearing to be the will of the deceased, he shall take possession of the same and produce it in court; and on application of the tax collector, or of any party in interest, the court shall proceed to the probate thereof. If an executor is therein appointed, the person named shall be notified, and if he does not within ten days after notification accept the appointment, and if within the ten days next following this delay no person

entitled to be appointed dative testamentary executor applies, for the appointment, then the public administrator in the parish of Orleans, and in the other parishes the tax collector, shall be appointed dative testamentary executor of the decedent, and the administration of his succession shall proceed as directed in this Part and according to law.

C. Procedure if no will is found. If the notary can find no will, he shall report the fact to the court; and thereupon the tax collector shall proceed against the legal heir or heirs of the deceased summarily by rule to fix the amount of tax due by him or them, and each of the heirs shall be ordered, within a delay to be fixed by the court, which may be extended from time to time, in the discretion of the court, to make and file a detailed descriptive list, sworn to and subscribed by him, of all the items of property contained in and composing the estate of the deceased, stating therein the actual cash value of each such item at the time of the death of the decedent, and the tax collector shall have a right to traverse the same. This list together with an inheritance tax return shall be filed with the collector of revenue. On trial of the rule the court shall fix the amount of tax due by each of the heirs, and shall render judgment for the same against each of them. In the same manner and under the same conditions as provided in R.S. 47:2407 and 47:2408, the heirs or legatees shall have the right to procure the sale of their inheritance or legacies for the purpose of paying the tax due thereon, with interest, costs and attorney's fee; and if payment thereof is not made by the heir or legatee, or if an order of sale, as above provided, is not granted within

thirty days after the date of the judgment, the tax collector shall be entitled to a similar order under which any property forming part of the inheritance or legacy may be sold.

§ 2410. Optional procedure for small estates

In any case, where the succession does not exceed fifty thousand dollars, the tax collector may in his discretion fix and collect the tax, upon an affidavit filed by the succession representative, heirs or legatees, showing the amount thereof in a manner satisfactory to the tax collector; and upon the payment of these taxes, or a certificate that none are due, and a certificate from the tax collector or his attorney that the affidavit together with an inheritance tax return, when required, has been filed with the collector of revenue, the parties entitled thereto may take possession free from the prohibitions or penalties of this Part.

§ 2411. Heirs or legatees incapable of alienation until tax paid

The heirs or legatees of an inheritance or legacy shall not be entitled to be placed in possession of the same or any part thereof and shall be without right or capacity to alienate any part thereof, until an inheritance tax return, together with a descriptive list or inventory or an affidavit of the succession property, has been filed with a collector of revenue and the tax on the whole or on such part as the court may permit to be paid or delivered, pursuant to Article 2951 of the Louisiana Code of Civil

Procedure, as shown by the return, shall have been paid, or until it shall have been judicially determined in the manner herein provided, that no part of the inheritance or legacy is subject to the tax imposed by this part.

§ 2412. Payment of tax by transferee

Notwithstanding the provisions of R.S. 47:2411, where the heir or legatee has made a transfer of the property inherited by or bequeathed to him, the transferee, or any one holding under him, may pay the tax levied to the officer authorized to receive the same, together with the interest and penalties that may be due thereon at the time of payment. Upon such payment his title to the property shall become in all respects as valid as if the tax had been paid by the heir or legatee, and all amounts so paid, together with attorney's fees of ten per centum (10%) thereon, may be recovered from the person originally liable therefor, in any court, of competent jurisdiction.

§ 2413. Certain acts prohibited prior to payment of tax

A. **Taking of possession by heirs, legatees or other beneficiaries.** It is unlawful for any heir, legatee or other beneficiary of a donation mortis causa to take or be in possession of any part of the things or property comprising the inheritance, legacy or other donation, or to dispose of the same o. any part thereof, until he has obtained the authority of the court to that effect, except as provided in R.S. 47:2410; and in case he shall so take or be

in possession or shall so dispose of such things or property, or any part thereof, he shall no longer have the right of renouncing the inheritance or donation mortis causa, and shall remain personally liable for the tax thereon; but he may, without waiting for authority, do any acts that may seem necessary to preserve the property from waste, damage or loss.

B. **Giving of possession by banks, depositories, or other custodians.**

(1) Unless the tax due under this Part has been paid, or unless it is determined judicially in the manner prescribed herein that no tax is due:

(a) no bank, banker, trust company, warehouseman, depository, or other person having on deposit, or having possession or control of any money, credits, goods, or other things or rights of value standing in the name of a deceased person, or in which the latter had an interest, shall deliver any such money or property to any heirs or legatees of the deceased person; and

(b) no corporation shall transfer to any heirs or legatees of a deceased person any stock or registered bonds of such corporation which were owned by the deceased person.

Except as provided hereinafter, any person or corporation so making delivery or transfer shall be liable for any inheritance tax due with respect to the property released.

(2) A person or corporation may deliver or transfer money or property standing in the name of a deceased person, or in which the latter had an interest without

incurring any liability for the inheritance tax due with respect to the property released, to:

(a) any person to whom it could have delivered such money or property if the deceased were alive, including any authorized agent of the deceased, if the person or corporation having possession has not received notice in writing addressed to it of the customer's death;

(b) the succession representative of the deceased who submits a certified copy of the letters issued to him by a court of competent jurisdiction; or

(c) the surviving spouse, heirs, or legatees of the deceased who submit a certified copy of the judgment of possession rendered by a court of competent jurisdiction which evidences their right to the possession of the money or property so delivered or transferred. A certified copy of such a judgment of possession constitutes full proof of the payment of all taxes due under this Part, or that no such tax is due.

Nothing contained herein shall be construed to repeal, modify, or affect R.S. 9:1513 or those provisions of R.S. 6:66 which provide that a copy of the letters issued to a succession representative, or of a judgment of possession, certified by the clerk of the court which issued or rendered it, is conclusive proof to a bank of the jurisdiction of such court.

(3) Banks and other depositories may without liability release the contents of a safety deposit box or any property standing in the name of a deceased person under the conditions set forth above, whether or not the

box has been entered for purposes of listing the contents thereof.

§ 2414. Creditors' rights preserved

Nothing contained in this Part shall affect the rights of creditors of persons deceased or the rights of the creditors of the heirs or legatees of such persons, as established by the general law.

§ 2415. Representation of nonresident and unknown heirs and legatees

Nonresident and unknown heirs and legatees and those whose whereabouts are unknown, shall be represented by a curator ad hoc appointed by the court and all notices, citations and demands prescribed by this Part shall be served on such officers. Though there be in any case more than one unknown or absent heir or legatee, all may be represented by the same curator.

§ 2416. Proceedings within jurisdiction of district courts

The district court of the last domicile of the deceased, and in the parish of Orleans, the civil district court, shall have original jurisdiction to hear and determine all the proceedings provided by this Part. In the case of a nonresident decedent, the court of any parish in which he left property, movable or immovable, shall exercise such jurisdiction, and the court in which such proceedings are first begun shall have exclusive original jurisdiction thereof.

§ 2417. Tax collector designated: promulgation of rules and regulations; tax return; expenses of administration

The inheritance tax collector to whom reference is made in this part is the collector of revenue for the state of Louisiana. The collector of revenue shall provide by rules and regulations appropriate procedures for filing of returns, payment of taxes, determination of taxes due and all other matters necessary to the function of inheritance tax collection. A return shall be filed in any instances when a tax is due, and shall be filed within nine months after the death of decedent. The collector of revenue may grant an extension of not more than fifteen months from the date of death of decedent in the filing of such returns if he determines there is good and reasonable cause therefor.

§ 2418. Disposition of collections

Except as provided in R.S. 47:2417, all taxes, interest and penalties collected pursuant to the provisions of this Part shall be remitted by the tax collector to the state treasurer not later than the tenth day of the following month, and shall be credited by the treasurer to the general fund.

§ 2419. Attorneys to assist the tax collectors; attorney's fees

Text as amended by Acts 1972, No. 326, § 3, eff. Jan. 1, 1973

A. The governor shall appoint, by and with the advice and consent of the senate, for a term to run concurrently with the term of the governor, an attorney at

law in each parish other than Orleans, and in Orleans Parish an attorney at law and a deputy who shall also be an attorney at law, removable at his pleasure, whose duty it shall be to advise, assist and represent the respective designated officials in their respective parishes in the enforcement of this Part.

B. Except in the parish of Orleans, those attorneys shall receive for their services, except as provided in R.S. 47:2409, a fee of four percentum (4%) on all taxes collected monthly hereunder up to one hundred fifty thousand dollars, and two percentum on amounts in excess thereof. In all successions in which no inheritance tax is due the attorneys, except in the parish of Orleans, shall receive for their services fees to be paid out of the assets of the succession as a legal charge thereof: one dollar where the gross value is less than one thousand dollars; two dollars where the gross value is one thousand dollars or more but less than three thousand dollars; five dollars where the gross value is three thousand dollars or more but less than five thousand dollars; ten dollars where the gross value is five thousand dollars or more but less than twenty thousand dollars; and twenty dollars where the gross value is twenty thousand dollars or more. In any succession in which any inheritance tax is due but in which four percentum of the total inheritance taxes due is less than the fee the attorney would have received under the provisions of this Section had there been no inheritance tax due, the attorneys, except in the parish of Orleans, shall receive an additional fee for their services equivalent to the difference between four percentum of the total inheritance taxes due and the fee he would have received under the provisions of this Section had there

been no inheritance tax due, the same to be paid out of the assets of the succession as a legal charge thereof, however, this provision for additional fees shall not apply in cases where proceedings are instituted under R.S. 47:2409. In no case shall the total fees collected under this subsection by any such attorney to assist the inheritance tax collector exceed the sum of twenty thousand dollars per annum; provided, however, that this limitation shall not apply to fees collected pursuant to R.S. 47:2409(D).

C. In the parish of Orleans, the attorney to assist the inheritance tax collector shall be paid twenty thousand dollars per annum in full compensation for his services and for the operation of his office, payable in equal monthly installments by the tax collector from inheritance taxes collected, and the deputy attorney to assist the inheritance tax collector shall be paid ten thousand dollars per annum in full compensation for his services and for the operation of his office, payable in equal monthly installments by the tax collector from inheritance taxes collected; provided, however, that any fees collected pursuant to R.S. 47:2409(D) shall be in addition to the moneys provided for in this subsection. The provisions of this section shall be applicable only to successions opened after January 1, 1973.

§ 2419. District offices; general counsel and staff

Text as amended by Acts 1972, No. 560, § 3

A. The collector of revenue shall designate one agent in each of the district offices of the Department of Revenue to exercise such functions, duties and responsibilities as may be necessary to enforce the collection of

the inheritance tax imposed by this part. The collector of revenue may create such district or sub-district offices and assign such agents thereto as he shall deem necessary to properly service the collection of the tax imposed by this Part.

B. The general counsel of the Department of Revenue and the attorney members of his staff shall advise, assist and represent the collector of revenue and agents assigned in each district office and subdistrict office as having the responsibility of enforcing the collection of the inheritance taxes.

For text as amended by Acts 1972, No. 326, § 3, eff. Jan. 1, 1973, see R.S. 47:2419, ante.

The preceding section was amended twice by Acts 1972, No. 326, § 3 and by Acts 1972, No. 560, § 3. Both acts have been printed above. The effective date for Act 326 is January 1, 1973; the effective date of Act 560 is January 1, 1974. However, § 5 of Act 560 provides that conflicting provisions of Act 326 are superseded by Act 560. See, Acts 1972, No. 560 §§ 5 and 8 noted under R.S. 47:2419 below.

§ 2420. Interest on delinquent tax; extension of time

A. Taxes hereby levied shall bear interest at the rate of one-half of one percent per month, beginning nine months after the death of the decedent, and one percent per month, beginning twelve months after the death of the decedent; saving to any heir, legatee, or donee the right to stop the running of interest against him by paying the amount of his tax with accrued interest, estimated

or ascertained, or by tendering the same to the tax collector in the manner prescribed by the general law. Provided, that in cases which the settlement of the succession is bona fide contested or when it is shown to the satisfaction of the tax collector that the beneficiary was ignorant of the inheritance the interest shall be remitted.

B. Provided further that in all cases in which reasonable cause therefor is established to the satisfaction of the district judge having jurisdiction of the succession, an extension of time may be granted upon application of the succession representative, heir or universal legatee of such decedent within which inheritance taxes hereunder may be fixed and paid, without interest or penalty; provided further that in all cases in which it shall be shown that it is required that succession of the decedent file a federal estate tax return, such fact shall ipso facto be deemed a reasonable cause for an extension not to exceed fifteen months after the date of death of the decedent within which to fix and pay any Louisiana inheritance tax.

C. The secretary may accept an extension of time to file a United States Estate Tax Return for the same decedent as an extension of time to file a Louisiana inheritance tax return.

§ 2421. Costs of proceedings

The costs of all the proceedings under this Part be borne by the mass of the succession. In cases in which it seems to him equitable to do so however, the judge may

apportion the costs among the several parties, or allow any party to retain his costs out of any sum found to be due by him for tax thereunder.

§ 2422. Prescription on actions for inheritance taxes

Inheritance taxes due to the state shall prescribe, as provided in the constitution, in three years from the thirty-first day of December of the year in which such taxes become due. The taxes shall be deemed due, so as to begin the running of prescription, on the day the inheritance tax return together with a copy of the petition, affidavit of death and heirship, will, if any, and sworn descriptive list or inventory is filed with the collector of revenue or on the date inheritance tax return is filed in succession record and submitted to the attorney for the inheritance tax collector, whichever is the latest.

§ 2423. Court may award state reasonable expert witness' fee in contested proceeding to determine tax due: tax collector may pay expert witness' fee allowed

In any proceedings to determine the amount of the inheritance tax due the state, when the amount claimed by the tax collector is contested by the heir or legatee, and the court renders judgment for the State for an amount larger than that admitted by the heir or legatee to be due, the court may award the State a reasonable fee for each expert witness used in the proceeding by the tax collector, to be taxed as costs of court. If, in such a case, judgment for the inheritance taxes due is rendered against two or more heirs or legatees, the reasonable fee

allowed for each such expert witness shall be assessed against each of the heirs or legatees in proportion to the amount of inheritance tax determined to be due by each.

The tax collector may pay each such expert witness the reasonable fee allowed by the court, upon receipt of payment thereof by the heir or legatee.

§ 2424. Application of provisions

The provisions of this Part shall apply to all successions opened by death subsequent to the date this code shall become effective; and successions opened prior thereto shall be subject to taxation under the laws in force at the time they were opened.

§ 2425. Inheritance tax return

A. **Requirements.** An inheritance tax return shall be prepared and filed by or on behalf of the heirs and legatees in every case where inheritance tax is due or where the gross value of the deceased's estate amounts to the sum of fifteen thousand dollars or more. The inheritance tax return shall be verified by a written declaration that it is made under the penalties imposed under this title for filing false reports or returns and that all copies of the accompanying documents are true and correct and the return shall state the full name of the deceased, his social security number, his residence at the time of death. Whether a federal estate tax return is required, and shall contain a calculation showing the computation of the tax, a list of the contents of any safe deposit box and a description of any assets standing in the name of the

deceased or any community property standing in the name of the deceased's spouse which was omitted from the assets of the estate with an explanation of the omission.

B. **Time and place for filing returns.** The original inheritance tax return shall be filed in the succession record. A duplicate original of the return accompanied by copies of the affidavit of death and heirship, the inventory or sworn descriptive list, the federal estate tax return, when it is required, the will of the deceased, if any, and the petition for possession, or in lieu thereof a court order authorizing the succession representative to file a tax return by providing a preliminary listing of the distribution of possession, shall be mailed to the secretary, within nine months after death of decedent or the time for filing of a federal estate tax return when it is required. If the succession representative or heirs or legatees so desire, these documents may be mailed by certified mail, return receipt requested, to the secretary, and the filing of the return receipt in the succession record shall constitute proof of service upon the secretary. When an estate is under judicial administration, the court having jurisdiction over the succession may extend the time for filing the return if the secretary consents or upon rule conducted contradictorily with the secretary.

C. **Regulations**. The form of the inheritance tax return and the procedure for mailing shall be in accordance with the regulation prescribed by the collector of revenue.

PART II. ESTATE TRANSFER TAX

§ 2431. Levy of tax

In addition to the inheritance tax as levied in Part I of this Chapter, there is hereby levied an estate transfer tax upon all estates which are subject to federal estate taxation under the Federal Internal Revenue Code.

§ 2432. Amount of tax and time of payment

A. **Amount of tax**. Wherever there is a credit allowed under the United States Internal Revenue Code as to the amount of the federal estate tax for amount of state death taxes, the maximum amount of the credit for the state death taxes shall be paid to the State of Louisiana. However, if the state inheritance taxes paid under Part I of this chapter exceed the federal credit, no additional payment will be due under Part II of this chapter. If the federal credit does exceed the inheritance taxes due under Part I of this chapter, then the difference between the amount of the federal credit and the amount of state inheritance tax shall be paid to the State of Louisiana.

B. **Time of payment**. The tax due under this part shall be due and payable prior to the filing of the United States Estate Tax Return or nine months after the death of decedent whichever come first.

C. **Changes or amendments in the United States Estate Tax Return.** Any change or amendment in the United States Estate Tax Return which would result in additional taxes due the state of Louisiana under this part shall be paid thirty days after final approval of the United States Estate Tax Return.

§ 2433. Proceedings to fix and collect tax

The provisions of Part I of this chapter, insofar as applicable, shall regulate the proceedings to fix the amount of tax hereby levied and the manner in which the same shall be collected.

§ 2434. Intent and purpose of this part

It is hereby declared to be the intent and purpose of this Part to obtain for this state the benefit of the estate tax credit allowed under the provisions of the United States Internal Revenue Code, to the extent that this state may be entitled under the said provisions, by imposing additional taxes. This part shall be liberally construed to effect that purpose.

§ 2435 Application of provisions

The provisions of this Part shall apply to the estates of persons dying on or after the effective date of this Title, and shall also apply to all estates not fully distributed and now in the process of settlement, where the date of death was subsequent to February 26th, 1926, provided there is at the time this Title goes into effect a sufficient amount still due the United States Government under the Federal Revenue Act of 1926 or under Subchapter A of Chapter 3 of the Federal Internal Revenue Code, from which to make the deduction contemplated by R.S. 47:2434.

§ 2436. Estate transfer tax return

A. **Requirements**. An estate transfer tax return shall be prepared and filed by or on behalf of the heirs and/or legatees in every case where estate transfer tax is due or

where the value of the deceased's net estate amounts to the sum of sixty thousand dollars or more. The estate transfer tax return shall be verified by a written declaration that it is made under the penalties imposed under this title for filing false reports or returns and that all copies of the accompanying documents are true and correct and the return shall state the full name of the deceased, his social security number, his residence at the time of death, the value of the estate and the calculation showing the computation of tax, whether or not a federal estate tax return was filed, a list of any contents of any safety deposit box which were omitted from the estate with an explanation for the omission and description of any assets standing in the name of deceased or any community property standing in the name of the deceased's spouse which was omitted from the succession with an explanation for the omission.

B. **Time and place for filing returns**. An estate tax return shall be mailed to both the collector of revenue and the person designated as the tax collector under the provisions of R.S. 47:2417 within nine (9) months after decedent's death or prior to the filing of a United States estate tax return, whichever comes first.

C. **Regulations**. The form of the estate transfer tax return and the procedure for mailing shall be in accordance with the regulation prescribed by the collector of revenue.

PART III. REFUNDS

§ 2451. Claims and suits for refund

Claims for refund of any erroneous payment or overpayment heretofore or hereafter made of inheritance, succession, legacy or estate taxes paid to the tax collector

and still held by said tax collector or turned over by the tax collector to the state treasurer shall be filed with the tax collector who has collected said tax, if he still holds same, or, if said tax collector has paid said tax to the state treasurer, then with the state treasurer, within fifteen months from the time said erroneous payment or overpayment was made by taxpayer or within six months after the judgment of the highest court in which any succession contest between the heirs and legatees becomes final, or within six months after a payment of federal estate tax, as to which tax a credit was allowed under the United States Internal Revenue Code for death taxes paid to the state of Louisiana, is refunded, in whole or in part, or a judgment of court, for such refund becomes final, whichever is later. In the event said claim is denied, then suit may be instituted by the taxpayer within ninety days after the denial of said claim for the recovery of said erroneous payment or overpayment against the tax collector, if the tax collector still holds the taxes in his or her possession, and, if the tax collector has paid said taxes or any part thereof over to the state treasurer, then suit may be instituted by the taxpayer against the state treasurer within ninety days after the denial of said claim by the state treasurer, for the recovery of said erroneous payment or overpayment of said taxes, but the amount recovered from the state treasurer shall not exceed the amount of taxes paid to the state treasurer by the tax collector. The state treasurer shall pay any amount recovered out of the general fund.

ACTS

PASSED BY

THE GENERAL ASSEMBLY

OF THE

STATE OF LOUISIANA

AT THE

REGULAR SESSION

Begun and Held in the City of
Baton Rouge, on the
Ninth Day of May, 1904.

PUBLISHED BY AUTHORITY OF THE STATE,

ACT NO. 45.

By Mr. Henry, of Orleans. House Bill No. 100.

AN ACT

To carry into effect Articles 235 and 236 of the Constitution of 1898 relative to inheritance taxes.

Section 1. Be it enacted by the General Assembly of the State of Louisiana; That there is now and shall hereafter be levied, solely for the support of the public schools, a tax upon all inheritances, legacies, and donations, provided no direct inheritance, or donation, to an ascendant or descendant, below ten thousand dollars, in amount or value shall be so taxed; a special inheritance tax, of three per cent on direct inheritances and donations to ascendants or descendants and ten per cent for collateral inheritances and donations to collaterals or strangers;

provided bequests to educational, religious or charitable institutions shall be exempt from this tax and provided further that this tax shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance; this tax to be collected on all successions not finally closed and administered upon and on all successions hereafter opened.

Sec. 2. Be it further enacted, etc.; That it shall be the duty of different judges throughout the State exercising probate jurisdiction, to require satisfactory proof before them that the succession or estate is not liable to the inheritance tax, before they shall grant a discharge to the administrator, executor, or other officer in charge of said succession and before he shall grant an order placing the heirs in possession.

Sec. 3. Be it further enacted, etc., That in all cases where the inheritance tax appears to be due, it shall be the duty of the administrator, executor, or other officer in charge of the succession, or of the heir to pay over to the Tax Collector of the parish where the succession is opened the full amount of said inheritance tax and to present the receipt to the Judge before obtaining a discharge or of being put in possession of the estate; the surety on the bond of the administrator, executor or other officer in charge of the estate shall be liable in solido with the officer for the full amount of the inheritance tax; such taxes shall be distributed to the several parishes in accordance with Article 248 of the Constitution.

Sec. 4. Be it further enacted, etc., That it shall be the duty of the Parish Superintendent and of the President of

the School Board in the City of New Orleans to see that this act be carried out, and that the full amount of the inheritance tax be duly collected, and it shall be the duty of the District Attorney for the various Parishes throughout the State, when called upon by the Parish Superintendent or the President of the School Board in the Parish of Orleans to take proceedings to enforce the provisions of this act.

Sec. 5. Be it further enacted, etc., That the funds thus realized shall not be budgeted against, except at the end of the year when the same shall have been realized, this being an uncertain and contingent source of revenue.

Sec. 6. Be it further enacted, etc., That this act shall take effect from and after its passage and all laws contrary thereto and in conflict with the same are hereby repealed.

R. H. SNYDER,
Speaker of the House of Representatives,
P. M. LAMBREMONT,
President pro tempore of the Senate.

Approved June 28th, A. D. 1904.

NEWTON C. BLANCHARD,
Governor of the State of Louisiana.

A true copy:

JOHN T. MICHEL,
Secretary of State.

ACTS

PASSED BY THE GENERAL ASSEMBLY

OF THE

STATE OF LOUISIANA

AT THE

REGULAR SESSION OF 1906.

ACT NO. 109.

By Mr. Dupre. House Bill No. 347.

(Chairman of the Committee on Ways and Means.)
Substitute for House Bills Nos. 77, 138 and 226.

AN ACT

To carry into effect Article 235 and 236 of the Constitution, and to levy taxes solely for the support of the public schools on all inheritances, legacies and other donations mortis causa, to provide exemptions therefrom, to prescribe the manner of collecting the same, to fix the fees of attorneys and commissions of tax-collectors, and to repeal all conflicting laws.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That there is now and shall hereafter be levied, solely for the support of the public schools, on all inheritances, legacies and other donations mortis causa to or in favor of the direct descendants or ascendants of the decedent, a tax of two per centum, and on all such inheritances or dispositions to or in favor of the collateral relatives of the deceased, or strangers, a tax of

five per centum on the amount or the actual cash value thereof at the time of the death of the decedent.

Section 2. Be it further enacted, etc., The said tax shall not be imposed in the following cases:

a. On any inheritance, legacy or other donation mortis causa to or in favor of any ascendant or descendant of the decedent below ten thousand dollars in amount or value.

b. On any legacy or other donation mortis causa to or in favor of an educational, religious or charitable institution.

c. When the property inherited, bequeathed or donated shall have borne its just proportion of taxes prior to the time of such donation, bequest or inheritance.

Section 3. Be it further enacted, etc., It shall be unlawful for any heir, legatee or other beneficiary of a donation mortis causa to take or be in possession of any part of the things or property composing the inheritance, legacy or other donation mortis causa, or to dispose of the same or any part thereof, until he shall have obtained the authority of the court to that effect, as hereafter provided; and in case he shall so take or be in possession or shall so dispose of such things or property, or any part thereof, he shall no longer have the right of renouncing such inheritance or donation mortis causa, and shall remain personally liable for the tax thereon; but he may, without waiting for authority do such acts as may seem necessary to preserve the property from waste, damage or loss.

Section 4. Be it further enacted, etc., The executor of the will of a person deceased, or the administrator of his succession, shall, after payment of his debts, proceed against the tax collector and all the heirs and legatees of the deceased summarily, by rule before the court which has jurisdiction of the succession, to fix the amount of tax due by each heir or legatee, and on trial thereof the court shall render judgment for the same against each heir or legatee, with interest and costs, as hereinafter provided.

Section 5. Be it further enacted, etc., The executor or administrator shall thereupon pay to the tax-collector the amount of tax, with interest and costs, so fixed, on each inheritance, legacy or donation, out of the funds comprised therein, if sufficient. Should there not be sufficient funds, the court shall, on the application of the heir or legatee, grant an order for the sale of the property composing such inheritance, legacy or donation, or so much thereof as may be necessary, for the purpose of paying such judgment. If the same be not paid by the heir or legatee, or an order of sale be not granted, as above provided, within thirty days after the date of the judgment, the court shall, on the application of the executor or administrator, grant an order of sale for the said purpose, as above provided, and the executor or administrator shall pay the said judgment out of the proceeds of the sale.

Such sale shall be made in such manner, and on such terms and conditions as the court shall prescribe, and the expense thereof shall be borne by the heir or legatee.

Section 6. Be it further enacted, etc., No executor or administrator shall deliver any inheritance or legacy until

the tax thereon shall be fixed and paid, as herein provided; otherwise he, together with his surety, shall be personally liable for said tax, with interest and cost. And no executor or administrator shall be discharged until it is shown that all taxes under this Act, due by the heirs and legatees, have been paid, or until it is judicially determined by the process herein provided that no tax is due.

Section 7. Be it further enacted, etc., In all cases in which an administration is not ordered by the court, the legal or instituted heir, or universal or residuary legatee, shall within six months after the death of the decedent, or, should there be a will, within the same time after the discovery of the same, present to the court a detailed descriptive list, sworn to and subscribed by him, of all items of property contained in and composing the estate of the decedent, and therein shall state the actual cash value of each such item at the time of the death of the decedent, and service thereof shall be made on the tax collector who shall have the right to traverse the same. Should the deceased have made special or particular legacies or donations mortis causa, the legatee shall also be served, and after summarily hearing the said parties the court shall fix the amount of tax due as aforesaid by each such heir or legatee, and shall render judgment therefor, with interest and cost, against each of them.

Section 8. Be it further enacted, etc., In the same manner as provided in Section 5, the heir or universal or residuary legatee shall thereupon pay or take measures for the payment of the tax due on all special or particular legacies or donations.

Section 9. Be it further enacted, etc., The heir or universal or residuary legatee may likewise obtain an order for the sale of the property of his inheritance or legacy, or part thereof, for the purpose of paying the tax thereon. But if such tax be not paid, or such order of sale be not made within thirty days after the date of the judgment fixing the amount of the tax, a similar order for the same purpose shall be granted on the application of the tax collector, and thereunder any property forming part of the inheritance or legacy may be sold, and the proceeds thereof shall be applied to the payment of the tax with interest and costs.

Section 10. Be it further enacted, etc., The heir or residuary or universal legatee shall not deliver any legacy until the tax thereon shall have been fixed and paid; otherwise he shall be personally liable for the said tax, with interest and costs.

Section 11. Be it further enacted, etc., If during the six months next following the death of any person leaving property, movable or immovable, within this State, an administration of his succession be not applied for, or his legal or instituted heir or universal or residuary legatee do not apply to the court to be placed in possession thereof, as herein provided, the court shall ex parte and on the application of the tax collector grant an order directing that a search be made for the will of the deceased by a notary public, and in aid of the same may order that all persons having in their possession or control any books, papers or documents of the deceased, or any bank-box, safe deposit vault or other receptacle likely or designed to contain the same, shall open such receptacle and exhibit the contents thereof, as well as all other

books, papers and documents of the deceased, to the said notary.

Section 12. Be it further enacted, etc., Should the said notary find any document appearing to be the will of the deceased, he shall take possession of the same and produce it in court; and on application of the tax collector, or of any party in interest, the court shall proceed to the probate thereof, as now provided by law. If an executor be therein appointed, the person named shall be notified, and if he do not within ten days after notification accept the appointment, and if within the ten days next following this delay no person entitled to be appointed dative testamentary executor shall apply for the appointment, then the Public Administrator in the Parish of Orleans, and in the other parishes the tax collector, shall be appointed dative testamentary executor of the said decedent, and the administration of his succession shall proceed as herein directed and according to existing law.

Section 13. Be it further enacted, etc., If the notary can find no will, he shall report the fact to the court; and thereupon the tax collector shall proceed against the legal heir or heirs of the deceased summarily by rule to fix the amount of tax due by him or them, and each of the heirs shall be ordered, within a delay to be fixed by the court, which may be extended from time to time in the discretion of the court, to make and file a detailed descriptive list, sworn to and subscribed by him, of all the items of property contained in the composing the estate of the decedent, stating therein the actual cash value of each such item at the time of the death of the decedent, and the tax collector shall have a right to traverse the same. On trial of the rule the court shall fix the amount of tax

due by each of the heirs, and shall render judgment for the same against each of them, and in such case, as well as in the cases mentioned in Section 12, shall include in the costs payable by the heir or legatee a fee of not more than ten per cent on the amount of tax due by each heir or legatee in favor of the attorney for the tax collector. In the same manner and under the same conditions as provided in Sections 5 and 9 of this Act, such heirs or legatees shall have the right to procure the sale of their inheritances or legacies for the purpose of paying the tax due thereon, with interest, costs and attorney's fees; and if payment thereof be not made by the heir or legatee, or if an order of sale, as above provided, be not granted, within thirty days' after the date of the judgment, the tax collector shall be entitled to a similar order, and thereunder any property forming part of the inheritance or legacy may be sold.

Section 14. Be it further enacted, etc., Should there be more than one legal or instituted heir or universal or residuary legatee any one of them may institute the proceedings provided by this Act, and the others shall be made parties thereto, and such heir shall be entitled to recover out of the mass of the succession one reasonable attorney's fee, besides his costs.

Section 15. Be it further enacted, etc., Nothing contained in this Act shall affect the rights of creditors of persons deceased, or the rights of the creditors of the heirs or legatees of such persons, as established by the general law.

Section 16. Be it further enacted, etc., Each inheritance or legacy is indivisible, and must be accepted or

renounced for the whole; and the heir or legatee shall not be entitled to be placed in possession of the same, and shall be without right or capacity to alienate any part thereof, until the tax on the whole shall have been fixed and paid, or until it shall have been judicially determined, in the manner herein provided, that no part of the same is subject to the tax imposed by this Act.

Section 17. Be it further enacted, etc., No bank, banker, trust company, warehouseman, or other depositary and no person or corporation or partnership having on deposit or in possession or control any moneys, credits, goods or other things or rights of value for a person deceased, or in which he had any interest, and no corporation the stock or registered bonds of which are owned by a person deceased shall deliver or transfer such moneys, credits, stock, bonds or other things or rights of value to any heir or legatee of such deceased person, unless the tax due thereon under this Act shall have been paid, or unless it be judicially determined in the manner herein prescribed that no tax is due by such heir or legatee. Otherwise the person or corporation so making delivery or transfer shall be liable for the said tax. But the order of a court of competent jurisdiction, directing such delivery or transfer, shall be full authority for the same.

Section 18. Be it further enacted, etc., The burden of proving facts establishing exemption from the tax imposed by this Act is upon the person claiming exemption.

Section 19. Be it further enacted, etc., The District Court of the last domicile of the deceased, and in the Parish of Orleans the Civil District Court, shall have

original jurisdiction to hear and determine all the proceedings provided by this Act. In the case of a non-resident decedent, the District Court, or Civil District Court, of any parish in which he left property, movable or immovable, shall exercise such jurisdiction, and the court in which such proceedings shall be first begun shall have exclusive original jurisdiction thereof.

Section 20. Be if further enacted, etc., Non-residents and unknown heirs and legatees, and those whose whereabouts are unknown, shall be represented by curator ad hoc appointed by the court, and all notices, citations and demands prescribed by this Act shall be served on such officers. Though there be in any case more than one unknown or absent heir or legatee, all may be represented by the same curator.

Section 21. Be if further enacted, etc., The tax collector spoken of and intended by this Act is the Sheriff and ex-officio Tax Collector of the parish in which was the last residence of the decedent, or in which is situated property of a non-resident decedent, and in the Parish of Orleans the Clerk of the Civil District Court. They shall receive a commission of two per cent on their collections of taxes under this Act.

Section 22. Be it further enacted, etc., In and for the Parish of Orleans the Governor shall appoint, by and with the advice and consent of the Senate, for a term of four years, an attorney at law, whose duty it shall be to advise, assist and represent the Clerk of the Civil District Court in the enforcement of this Act. For his services, except as provided in Sections 12 and 13, he shall receive a fee of four per cent on all taxes collected hereunder,

payable out of the same before transmission to the Treasury. In all other parishes of the State the said duties shall be performed by the attorneys appointed under existing law to assist the tax collectors in the collection of delinquent licenses, and the compensation of such attorneys shall be as above provided.

Section 23. Be it further enacted, etc., In fixing the value of any legacy or donation mortis causa which consists in whole or in part of an annuity or usufruct or right of use or habitation, the court shall consider the expectancy of life of the legatee or donee according to the table known as the American Experience Table of Mortality, at six per cent per annum compound interest.

Section 24. Be it further enacted, etc., The taxes hereby levied shall bear interest at the rate of two per cent per month, beginning six months after the death of the decedent; saving to any heir, legatee or donee the right to stop the running of interest against him by paying the amount of his tax with accrued interest, or by tendering the same to the tax collector in the manner prescribed by the general law; provided, however, that in cases in which the settlement of the succession is not unduly delayed, or in which the right of any party to receive an inheritance or legacy is contested, and in all cases in which the failure to pay tax on any legacy or inheritance within the period aforesaid is not imputable to the laches of the heir or legatee, the court may, in its discretion, remit such interest.

Section 25. Be it further enacted, etc., The costs of all proceedings under this Act shall be borne by the mass of the succession; provided, that in cases in which it

seems to him equitable to do so the judge shall have power to apportion the costs among the several parties, or allow any party to retain his costs out of any sum found to be due by him for tax hereunder. Provided, the provisions of this Act shall affect all successions not finally closed, or in which the final account has not been filed.

J. W. HYAMS,
Speaker of the House of Representatives.
P. M. LAMBREMONT,
President Pro Tem. of the Senate.

Approved July 7, 1906.

NEWTON C. BLANCHARD,
Governor of the State of Louisiana.

A true copy:

EUGENE J. McGIVNEY,
Assistant Secretary of State.

HOME RULE CHARTER
OF THE
CITY OF NEW ORLEANS
EFFECTIVE MAY 1, 1954
(AS AMENDED TO MARCH 23, 1983)

Section 3-112. Introduction, Consideration, and Passage of Ordinances. (1) Proposed ordinances must be complete and in writing and may be introduced by any member at any meeting of the Council. Every ordinance shall embrace but one object except those approving the annual operating and capital budgets and codifications.

(2) After a proposed ordinance has been introduced, copies of it shall forthwith be prepared and distributed to each member of the Council and the Mayor.

(3) A proposed ordinance shall not be altered or amended during its consideration so as to nullify its original purpose, or so as to accomplish an object not cognate to its original purpose.

(4) A proposed ordinance shall lie over at least one week before being finally considered by the Council.

(5) Proposed ordinances on any of the following specified subjects can be adopted only at a regular meeting of the Council and shall not be adopted until at least twenty-one days after copies thereof shall have been distributed to all members of the Council and made available to the public, nor until a notice of the introduction of such proposed ordinance shall have been published in

the official journal of the City not less than one week nor more than two weeks after the introduction thereof, which notice shall state the substance of the proposed ordinance and the date of the meeting at which the Council shall begin its consideration thereof, to wit:

(a) Levying any tax or excise not imposed at the effective date of this Charter, or increasing the rate of any tax or exise.

(b) Imposing any license, requiring any permit, establishing any charge for services rendered, not imposed, required, or established at the effective date of this Charter, or increasing the rate of any license, fee, or service charge.

(c) Zoning or rezoning, or changing the zoning districts or classifications.

(d) Alienating any immovable property; granting any servitude, franchise, or privilege.

(6) Each proposed ordinance shall be read by title when called for final passage.

(7) Votes at final passage shall be taken by ayes and nays and the names of the councilmen voting for and against each proposed ordinance or amendment shall be entered upon the journal of proceedings to be kept of all transactions of the Council.

(8) No proposed ordinance shall be adopted except by the affirmative vote of a majority of all members of the Council.

(9) Should the Council by unanimous vote of a quorum declare the existence of an emergency due to a public calamity, the Council by unanimous vote of a quorum may waive all of the requirements of this Section pertaining to procedure, except those relating to the number

of votes required for passage and the recordation of the vote in the official journal.

Section 3-113. Submission of Ordinances to the Mayor. (1) Every ordinance adopted by the Council shall be signed by its presiding officer and presented promptly by the Clerk to the Mayor.

(2) The Mayor, within ten calendar days of receipt of an ordinance, shall return it to the Clerk with or without his approval, or with his disapproval. If the ordinance has been approved it shall become law upon its return to the Clerk; if the ordinance is neither approved nor disapproved it shall become law at twelve o'clock noon on the tenth calendar day after its adoption; if the ordinance is disapproved, the Mayor shall submit to the Council through the Clerk a written statement of his reasons for his veto. The Clerk shall record upon the ordinance the date of its delivery to and receipt from the Mayor.

(3) Ordinances vetoed by the Mayor shall be presented by the Clerk to the Council at its next regular meeting and should the Council then or at its next regular meeting, adopt the ordinance by an affirmative vote of two-thirds of all its members, it shall become law.

(4) The Mayor may disapprove or reduce any item or items of appropriation in any ordinance except any such item or items appropriated for the purpose of auditing or investigating any part or all of the Executive Branch. Subject only to the foregoing exceptions, the approved part or parts of any ordinance making an appropriation shall become law and the part or parts disapproved shall not become law unless subsequently passed by the Council over the Mayor's veto as provided herein.

(5) All ordinances which have become law shall immediately be deposited in the official archives of the Clerk of Council. The Clerk shall note on the face of the ordinance the date and time it has become law and the ordinance shall become effective at noon on the following day, provided that ordinances adopted to meet emergencies shall become effective at the time they become law. Except as otherwise provided in this Charter, the Clerk shall cause each ordinance which has become law to be published in full in the official journal.

Supreme Court
FILED
FEB 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1174

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD HIRSCH, AS TESTAMENTARY EXECUTOR OF THE SUCCESSION OF JEANNE GODCHAUX, WIDOW OF ARIEL B. NEWMAN, JR., ET AL,
Petitioner,

versus

CITY OF NEW ORLEANS AND PAUL MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS,,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION

CITY OF NEW ORLEANS
OKLA JONES, II, City Attorney
1300 Perdido Street
Room 2W23 City Hall
New Orleans, La. 70112
Telephone (504) 565-6200
Counsel of record for Respondent

William Aaron, Jr.
Chief Deputy City Attorney
Counsel for Respondent

Dan Zimmerman
Deputy City Attorney
Counsel for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

i

QUESTIONS PRESENTED FOR REVIEW

Respondents, pursuant to Rule 34.2 of this Court, accepts Petitioner's statement of the Questions Presented for Review, while continuing to deny that these questions are worthy of a grant of the writ of certiorari.

LIST OF PARTIES

Pursuant to Rule 34.2 of this Court, the City accepts Petitioner's statement of the List of Parties Seeking Review as to those parties represented by Counsel of Record for Petitioner and by Counsel for Petitioner. The City objects to the inclusion in Petitioner's List of Parties of those parties in the state court proceedings who have not joined in the petition for writ of certiorari.

In addition, Respondents the City of New Orleans and Paul Mitchell, the Director of Finance of the City of New Orleans, were "parties to the proceeding in the court whose judgment is sought to be reviewed", see Supreme Court Rule 34.1(b), but were not listed in Petitioner's List of Parties.

TABLE OF CONTENTS

Page

Questions Presented For Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Introduction 1

Jurisdiction 1

Statement of Facts 1

Opinions Below 1

Summary of Reasons Why the Petition Should Be Denied 2

Reasons Why the Petition Should Be Denied 2

I There Are No "Special And Important Reasons" For Granting The Petition 2

II The City's Inheritance Tax Has Been Repealed 4

III The Judgment Of The Louisiana Supreme Court Was Based On Adequate And Independant State Grounds 5

IV The Judgment Of The Louisiana Supreme Court Was Correct 8

Conclusion 9

TABLE OF AUTHORITIES

CASES **PAGE**

Agins v. City of Tiburon, 447 U.S. 255, 260 nt. 6 (1980) 3

Asarco, Inc., v. Kadish, ___ U.S. ___ S.Ct. 2037, 2049 (1989) 6

Caldwell v. Mississippi, 472 U.S. 320, 327 (1981) 5

District of Columbia v. Sweeny, 310 U.S. 631 (1940) . . . 4

Hildebrand v. City of New Orleans, 549 So.2d 1219 (La. 1989) 1

International Longshoreman's Ass'n. v. Davis, 476 U.S. 380, 387 (1986) 5

McCulloch v. Maryland, 17 U.S. 316 (1819) 7

Michigan v. Long, 463 U.S. 1032 (1983) 5,6,7

New York v. Class, 475 U.S. 106, 109-10 (1986) 6

Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70, 74 (1955) 2,4

Hildebrand v. City of New Orleans, 549 So.2d 1219 (La. 1989) 1

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 17.1 2

Rule 34.1 ii

Rule 34.2 . . . . . i,ii

FEDERAL STATUTES

28 U.S.C. § 1257 1

TABLE OF AUTHORITIES (continued)

PAGE

LOUISIANA LAW

Louisiana Constitution of 1974 5,6,7,8

Louisiana Constitution of 1921 5

Civil Code of Louisiana 5

Act 159 of 1912 Louisiana Legislature 5

Home Rule Charter of the City of New Orleans 5,8

TREATISE

Baker, *A Practical Guide to Certiorari*, 33 Cath.U.L.Rev. 611, 616-17 (1986) 3

INTRODUCTION

Respondents, the City of New Orleans and Paul Mitchell, the Director of Finance of the City of New Orleans, hereafter referred to as "the City", respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Louisiana Supreme Court's opinion in this case. That opinion, *Hildebrand v. City of New Orleans*, is reported at 549 So.2d 1218 (La. 1989).

JURISDICTION

The City accepts the statement of jurisdiction as set forth in the petition, except to note that Petitioner apparently seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257(a); Petitioner's reference to the now-repealed subsection (3) of 28 U.S.C. §1257 (see p. 2 of petition) is in error.

STATEMENT OF FACTS

Because this case was decided on cross-motions for summary judgment, there is no need for a detailed statement of facts. Those facts which are relevant to this case are set forth in the opinion of the Louisiana Supreme Court and may be found at pages 8 - 10 of the Appendix to the petition.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court and the denial of rehearing by that court in this case are set forth in pages 1 - 52 of the Appendix to the petition; the order of the trial court and that court's reasons for the ruling are set forth in pages 76 - 96 of the Appendix to the petition.

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

1. No "special and important" reasons for granting certiorari have been shown.

2. The City's inheritance tax has been repealed.

3. The judgment of the Louisiana Supreme Court is based on adequate and independent state law grounds.

4. The judgment of the Louisiana Supreme Court was correct.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THERE ARE NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING THE PETITION

Rule 17.1 of the Rules of the Supreme Court of the United States provides that "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be *granted only when there are special and important reasons therefor.*" (emphasis added)

This court has stated that "special and important reasons" "imply a reach to a problem beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955). A review of the record leaves no doubt that the petition fails to meet this threshhold test -- Petitioners have presented no special or important reasons for this court to grant certiorari.

It has been said that:

"The heart of the petition [for certiorari] is the section setting out the reasons for granting review. It should answer the two questions that are asked of all petitioners:

1) Does the decision of the court below create an intolerable conflict among the nation's lower courts?

2) Did the court below commit an error so important that it must be corrected immediately?

Both questions should be answered in every brief seeking Supreme Court review." Baker, *A Practical Guide to Certiorari*, 33 Cath.U.L.Rev. 611, 616-17 (1986). As set forth herein, one may search the certiorari petition in vain for any affirmative response to either of these questions.

A review of the petition shows that Petitioner has made no effort to demonstrate the existence of "special and important reasons" such as would justify a grant of certiorari. Instead, Petitioner raises each issue, discusses why the Louisiana Supreme Court allegedly incorrectly decided each issue under Louisiana law, and then adds a conclusory paragraph that petitioner's rights under the federal constitution have been violated.

"The appellant's objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court." *Agins v. City of Tiburon*, 447 U.S. 255, 260 nt. 6 (1980).

II

THE CITY'S INHERITANCE TAX HAS BEEN REPEALED

As Petitioner notes, the Council of the City of New Orleans by unanimous vote on November 2, 1989, repealed the City's inheritance tax. (see Appendix to petition, p. 74 - 75). The repeal ordinance was signed into law by the Mayor of the City of New Orleans on November 6, 1989.

An ordinance is currently pending in the City Council which would call for a vote of the citizens of the City of New Orleans on a City Charter amendment which would prohibit the City from reenacting an inheritance tax; additionally, a bill has been proposed for the upcoming session of the Louisiana Legislature which would prohibit Louisiana parishes and municipalities from imposing an inheritance tax.

While the repeal of the tax does not automatically render this case moot, it clearly establishes yet another reason why this court should decline to grant certiorari. See *District of Columbia v. Sweeney,* 310 U.S. 631 (1940) (certiorari denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance.")

The repeal of the tax has clearly left the petition only "academic or episodic" questions with which this court need not concern itself. *Rice,* supra, 349 U.S. at 74.

III

THE JUDGMENT OF THE LOUISIANA SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

This court may not review the decision of a state's highest court if that decision is "clearly and expressly . . . based on bona fide separate, adequate and independent [state law] grounds." *Michigan v. Long,* 463 U.S. 1032, 1041 (1983). See also *Caldwell v. Mississippi,* 472 U.S. 320, 327 (1981) ("plain statement" of adequate and independent state law grounds required.); *International Longshoreman's Ass'n. v. Davis,* 476 U.S. 380, 387 (1986) ("We have no authority to review state determinations of purely state law.")

The City's power to levy an inheritance tax is quintessentially a question of state law, as the validity of the tax depends on review of the 1954 Home Rule Charter of the City of New Orleans, Act 159 of the 1912 Louisiana Legislature (the predecessor to the Home Rule Charter), and various provisions of the current (1974) Louisiana Constitution, the Louisiana Constitution of 1921, the Civil Code of Louisiana, and cases from the state courts of Louisiana.

The judgment of the trial court (see Appendix to petition, p. 76 - 77) granting Petitioner's summary judgment motion was that the inheritance tax ordinances "are found by this Court to be violative of the Louisiana Constitution of 1974, illegal under our laws and jurisprudence and unenforcable in several of its applications." See also Reasons for the Rulings by the trial court judge (Appendix to petition, p. 78 -96) -- "this Court finds that the ordinance

to petition, p. 78 -96) -- "this Court finds that the ordinance imposing an inheritance tax is in direct violation of the 1974 Constitution of the State of Louisiana. . . ." (Appendix to petition, p. 96).

The opinion of the Louisiana Supreme Court clearly contains the requisite "plain statement" of reliance on state law which precludes a grant of certiorari.

Case law is limited as to a finding of an independent and adequate state law ground, as denials of certiorari generally are without opinion. However, a comparison of the instant case with those cases in which this Court has found the "plain statement" of state law grounds to be inadequate leaves little doubt that, in this case, state law does provide an adequate and independent basis for the decision.

Most recently, this court has stated: "The state court mentioned the state constitution several times in its opinion but otherwise relied exclusively on federal law . . . . Its discussion focuses solely on the federal statute." *Asarco Inc. v. Kadish*, ____ U.S. ____, 109 S.Ct. 2037, 2049 (1989). See also *New York v. Class*, 475 U.S. 106, 109-10 (1986) ("The Opinion of the New York Court of Appeal mentions the New York Constitution but once and then only in direct conjunction with the United States Constitution."); *Michigan v. Long supra*, 463 U.S. at 1037 (1983) ("The Court below referred twice to the State Constitution in its opinion, but otherwise relied exclusively on federal law.")

It is clear beyond peradventure that the instant case stands in marked contrast to those cited above.

While the Louisiana Supreme Court's opinion cites various federal cases (often for such general principles as "the power to tax is the power to destroy", *McCulloch v. Maryland*, 17 U.S. 316 (1819) (Opinion, Appendix to petition, p. 15)) and refers on occasion to the United States Constitution, the issues considered by the Court relate overwhelmingly to state law concerns such as the City's taxing power under Louisiana Law (Opinion, Appendix to petition p. 11 - 14), alleged violations of the Louisiana Constitution (Opinion, Appendix to petition, p. 14 - 23), preemption under state law (Opinion, Appendix to petition p. 27 - 32), the Civil Law concept of "seizin" (Opinion, Appendix to petition p. 32 - 34), the expiration date of the tax and various alleged procedural deficiencies, all under state law (Opinion, Appendix to petition, p. 34 - 39), and retroactivity (citing state law cases) (Opinion, appendix to petition, p. 39 -42). Only 4 pages of the 42 page opinion, as reprinted in the Appendix to the petition, address the issues of equal protection and due process under both the state and federal constitutions.

Even a casual reading of the opinion of the Louisiana Supreme Court leaves no doubt that this case is inherently and explicitly based on state law issues. The opinion is replete with references to state constitutional and codal provisions and citations to Louisiana state court cases. The Decree of the Louisiana Supreme Court (Opinion, Appendix to petition p. 42) reversed the trial court which, as set forth above, had held the inheritance tax in violation of the Louisiana Constitution and the laws of the state of Louisiana.

In short, it is "clear from the opinion itself that the state court relied upon an adequate and independent state grount" and that the state court did *not* rest "its decision primarily on federal law." *Michigan v. Long*, supra, 463 U.S. at 1042.

IV

THE JUDGMENT OF THE LOUISIANA SUPREME COURT WAS CORRECT

The City of course need not address in depth the merits of this case in this Opposition; however, a brief paragraph is in order.

The initial opinion of the Louisiana Supreme Court and its subsequent opinion denying rehearing are reprinted at pages 1-52 of the Appendix to the petition. In these opinions, the court considered at length the City's power under state law to levy an inheritance tax and Petitioner's assertion that the tax violated numerous provisions of the Louisiana Constitution. Inherently and peculiarly civil law concepts such as "seizin" are involved, as well as fundamentally non-federal issues such as the City's powers under its Home Rule Charter and under the Louisiana Constitution. There is no doubt that the Louisiana Supreme Court is the best and final arbiter of the meaning of state law. That court's ruling is, simply put, correct; there is no reason for this court to review that decision.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted

CITY OF NEW ORLEANS
OKLA JONES, II, City Attorney
1300 Perdido Street
Room 2W23 City Hall
New Orleans, La. 70112
Telephone (504) 565-6200
Counsel of record for
Respondent

William Aaron, Jr.
Chief Deputy City Attorney
Counsel for Respondent

Dan Zimmerman
Deputy City Attorney
Counsel for Respondent